

Appeal Brief

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Dated: August 10, 2011

Electronic Signature for Charles A. Bieneman: /Charles A. Bieneman/

Docket No.: 66703-0014
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Lester K. Chu et al.

Application No.: 10/800,444

Confirmation No.: 1779

Filed: March 15, 2004

Art Unit: 3625

For: INFORMATION DISTRIBUTION SYSTEM
AND METHOD THAT ORGANIZES
LISTINGS USING TIERS

Examiner: N. D. Rosen

APPEAL BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This Appeal Brief is filed pursuant to 37 C.F.R. § 41.37(a) in furtherance of the Notice of Appeal filed on June 23, 2011. This Appeal Brief appeals the decision of the Examiner in the Final Office Action dated April 28, 2011 ("Final Office Action"). This application was filed on March 15, 2004.

The fees required under 37 C.F.R. § 41.20(b)(2) are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains items under the following headings as required by 37 C.F.R. § 41.37 and M.P.E.P. § 1205.2:

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I. REAL PARTY IN INTEREST

The real party in interest is SuperMedia, LLC (formerly named Idearc Media Corp.), Assignee, a corporation having a place of business at 2200 W. Airfield Dr., P.O. Box 619810, DFW Airport, Texas, 75261-9810.

II. RELATED APPEALS AND INTERFERENCES

On February 19, 2008, an Appeal Brief was filed in U.S. Application No. 10/801,156, filed March 15, 2004, and entitled “INFORMATION DISTRIBUTION SYSTEM AND METHOD THAT PROVIDES FOR ENHANCED DISPLAY FORMATS,” which subsequently issued on July 5, 2011 as U.S. Patent No. 7,974,878. The Board’s Decision on this appeal is included in Appendix C.

On April 8, 2008, an Appeal Brief was filed in U.S. Application No. 10/948,425, filed September 23, 2004, and entitled “BUSINESS RATING PLACEMENT HEURISTIC,” which subsequently issued on April 7, 2009 as U.S. Patent No. 7,516,086. The Board did not render a decision in this appeal.

On December 9, 2008, an Appeal Brief was filed in U.S. Application No. 11/340,647, filed January 27, 2006, and entitled “INFORMATION DISTRIBUTION SYSTEM,” which subsequently issued on July 5, 2011 as U.S. Patent No. 7,974,879. The Board’s Decision on this appeal is included in Appendix C.

On November 9, 2009, an Appeal Brief was filed in U.S. Application No. 11/180,123, filed July 13, 2005, and entitled “INTEGRATED PAY PER CLICK AND PAY PER CALL LISTINGS.” This appeal is presently pending.

On October 6, 2010, an Appeal Brief was filed in U.S. Application No. 11/237,813, filed September 29, 2005, and entitled “PAY FOR CALL PARTNERING.” This appeal is presently pending.

Applicants (hereinafter “Appellants”) are not aware of any other related appeals or interferences that would affect the Board’s decision on the current appeal.

III. STATUS OF CLAIMS

Claims 1-56 are pending, are the subject of this appeal, and are reproduced in an Appendix to this brief.

IV. STATUS OF AMENDMENTS

Appellants filed a Response Pursuant to 37 C.F.R. § 111 on September 9, 2009. In that response, Appellants amended claims 1, 48 and 49. No claims were canceled, and no new claims were added. The Examiner then issued a Final Office Action dated April 28, 2011. Appellants did not make, and the Examiner did not enter, any amendments to the application subsequent to the final rejection.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The following is a concise explanation of the subject matter defined in at least each of the independent claims involved in the appeal, as required by 37 C.F.R. § 41.37(c)(1)(v). The following explanation is not intended to be used to construe the claims, which are believed to speak for themselves. Nor do Appellants intend the following explanation to modify or add any claim elements, or to constitute a disclaimer of any equivalents to which the claim would otherwise be entitled. Nor is any reference to certain preferred embodiments herein intended to disclaim other possible embodiments.

This summary of the presently claimed subject matter indicates certain portions of the specification (including the drawings) that provide examples of embodiments of elements of the claimed subject matter. It is to be understood that other portions of the specification not cited herein may also provide examples of embodiments of elements of the claimed subject matter. It is also to be understood that the indicated examples are merely examples, and the scope of the claimed subject matter includes alternative embodiments and equivalents thereof. References herein to the specification are thus intended to be exemplary and not limiting.

A. Claim 1

Claim 1 recites an information distribution system (e.g., Figure 1, element 100), comprising:
a user subsystem, said user subsystem providing for a request from a user and a response, wherein said user subsystem provides for receiving said request and providing said response (e.g., Specification, page 63, lines 29-31; page 64, lines 1-2);

one or more computer servers configured to provide:

a listing subsystem, said listing subsystem providing for a plurality of listings, wherein at least a subset of said listings are included in said response (e.g., Specification, page 65, lines 30-32);

a plurality of groups, wherein each said listing in said response is associated with at least one said group, each said group being determined at least in part according to said request (e.g., Specification, page 7, lines 18-21); and

an administrative subsystem, said administrative subsystem providing for a tier, wherein said administrative subsystem selectively identifies two or more listings within said

response for inclusion in said tier, wherein said listings within said tier are ordered in accordance with at least one of: (a) a random heuristic; (b) a weighted random heuristic; and (c) a placement heuristic not applied to all of the listings in said response (e.g., Specification, page 14, lines 17-22; page 63, lines 20-21).

B. Claim 38

Claim 38 recites a system for distributing information (e.g., Figure 1, element 100), comprising:

- a depository of information, said depository of information including a plurality of listings (e.g., Specification, page 30, lines 26-28); and

- a server, said server including a request from a user, a response, and a plurality of administrative rules, said plurality of administrative rules including a plurality of placement heuristics (e.g., Specification, page 29, lines 22-24; page 32, lines 5-7; page 39, lines 19-21; page 41, lines 18-19; page 42, lines 4-6);

- wherein said server is configured to generate said response from said request by accessing said depository of information and said administrative rules (e.g., (Specification, page 64, lines 1-2);

- wherein said administrative rules provide for ordering said listings included in said response (e.g., Specification, page 12, line 31-page 13, line 1; page 14, lines 17-18; page 21, lines 4-8);

- wherein said administrative rules provide for identifying two or more listings in said response as belonging to a tier identified from a plurality of tiers (e.g., Specification, page 22, lines 21-24, 33-34); and

- wherein said administrative rules prioritize said listings within said of tiers using said plurality of placement heuristics (e.g., Specification, page 22, lines 21-24); and

- wherein said administrative rules provide for generating a plurality of groups, wherein each said listing in said response is associated with at least one said group, each said group being determined at least in part according to said request (e.g., Specification, page 12, line 30-page 13, line 2).

C. Claim 48

Claim 48 recites an information distribution system (e.g., Figure 1, element 100), comprising:

one or more computer servers configured to provide:

a user subsystem, said user subsystem providing for a request from a user and a response, wherein said user subsystem provides for receiving said request and providing said response (e.g., Specification, page 63, lines 29-31; page 64, lines 1-2);

a listing subsystem, said listing subsystem providing for a plurality of listings, wherein at least a subset of said listings are included in said response (e.g., Specification, page 65, lines 30-32); and

an administrative subsystem, said administrative subsystem providing for a plurality of tiers, wherein said administrative subsystem selectively identifies two or more listings within said response for inclusion in one of said tiers, wherein said listings within said one of said tiers are ordered in accordance with at least one of: (a) a random heuristic; (b) a weighted random heuristic; and (c) a placement heuristic (e.g., Specification, page 14, lines 17-22; page 63, lines 20-21),

said administrative subsystem further providing for generating a plurality of groups, wherein each said listing in said response is associated with at least one said group, each said group being determined at least in part according to said request (e.g., Specification, page 12 line 30-page 13, line 2).

D. Claim 49

Claim 49 recites a method for displaying a response to a request, comprising:

configuring a plurality of administrative rules implemented on a computer server to organize a plurality of listings within a response into at least one tier based on a plurality of tier criteria, wherein said administrative rules include a tier placement heuristic for ordering listings within the tier, wherein not all listings within the response belong to the tier (e.g., Specification, page 21, lines 4-8; page 22, lines 21-24; page 42, lines 20-21);

inputting the tier criteria to the computer server to define on the computer server the number of tiers in the response and the number of listings within the tiers (e.g., Specification, page 46, lines 26-29); and

configuring the administrative rules on the computer server to generate a plurality of groups, wherein each said listing in said response is associated with at least one said group, each said group being determined at least in part according to a request from a user (e.g., Specification, page 12, line 30-page 13, line 2).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The Final Office Action set forth the following grounds for rejecting Appellants' claims, which grounds are to be reviewed in this appeal:

1. Claims 1, 4, 5, 6, 10, 13, 14, 17, 18, 22, 23, 26, 27, 31, 36, and 48 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 7,110,993 ("Soulanille") in view of U.S. Patent No. 6,801,906 ("Bates").
2. Claims 2 and 3 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of an article by Weidlich entitled "Search Engine Marketing Revving Up."
3. Claims 7, 8, 9, 11, 12, 15, 19, and 37 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of U.S. Patent Application Publication No. 2003/0177076 ("Might").
4. Claims 16 and 24 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of U.S. Patent Application Publication No. 2004/0167845 ("Corn").
5. Claims 20 and 21 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of U.S. Patent No. 6,564,208 ("Littlefield").
6. Claim 25 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of U.S. Patent Application Publication No. 2006/0190328 ("Singh").
7. Claims 28 and 29 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of an article by Barron entitled "Fundraising for Libraries: 25 Proven Ways to Get More Money for Your Library."
8. Claims 28 and 29 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of an article by Loh et al. entitled "Polymerase Chain Reaction with Single-Sided Specificity: Analysis of T Cell Receptor Delta Chain."
9. Claims 28 and 29 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of U.S. Patent Application Publication No. 2003/0167199 ("Thomann").
10. Claim 30 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of U.S. Patent Application Publication No. 2001/0003177 ("Schna").
11. Claim 32 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of U.S. Patent Application Publication No. 2004/0186769 ("Mangold").

12. Claim 33 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille, Bates and Mangold, and further in view of an article by Mahanta et al. entitled “BT Dotcom” (“Mahanta”).

13. Claim 32 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of U.S. Patent Application Publication No. 2002/0010015 (“Acres”).

14. Claim 33 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille, Bates and Acres, and further in view of Mahanta.

15. Claims 34 and 35 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille and Bates, and further in view of Acres.

16. Claims 38-42 and 44-46 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille in view of the anonymous article, “Google Comes Out Ahead,” and Bates.

17. Claim 43 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille, the anonymous article, “Google Comes Out Ahead,” and Bates, and further in view of Might.

18. Claim 47 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille, the anonymous article “Google Comes Out Ahead,” and Bates, and further in view of Littlefield.

19. Claims 49 and 52-56 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille in view of U.S. Patent Application Publication No. 2003/0093482 (“Watanabe”) and Bates.

20. Claim 50 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille, Watanabe, and Bates, and further in view of Thomann.

21. Claim 51 was rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Soulanille, Watanabe, and Bates, and further in view of Might.

VII. ARGUMENT

A. **The Law.**

With respect to Section 103 rejections, the Examiner has a burden of stating a prima facie case of obviousness. A prima facie case of obviousness has historically required that:

First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations.

MPEP, § 2143 (citing In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

So long as the first requirement for a prima facie case of obviousness is not rigidly applied, requiring the Examiner to show some reason for combining prior art references is consistent with the United States Supreme Court's decision in KSR International Co. v. Teleflex, Inc., 127 S.Ct. 1727, 82 USPQ2d 1385 (2007). In KSR, the Supreme Court stated that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." (Id. at 1739, 82 USPQ2d at 1395.) Additionally the court stated that

It can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does. This is so because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.

(Id. at 1741, 82 USPQ2d at 1396.) The Court further explained that

What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under §103. One of the ways in which a patent's subject matter can be proved obvious is by noting that there existed at the time of invention a known problem for which there was an obvious solution encompassed by the patent's claims.

(Id. at 1742, 82 USPQ2d at 1397.) Accordingly, the Court made clear that "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art." (Id. at 1731, 82 USPQ2d at 1389.) In summary, KSR plainly does not disturb the well-settled proposition that a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention.

W.L. Gore & Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984); M.P.E.P § 2141.02.

B. Ground Of Rejection No. 1: Claims 1, 4-6, 10, 13, 14, 17, 18, 22, 23, 26, 27, 31, 36, And 48 Are Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille And Bates.

1. The Combination Of Soulanille And Bates Does Not Teach Or Suggest All Of The Elements Of The Claims.

The combination of Soulanille and Bates fails to teach or suggest numerous elements of Appellants' claims. Independent claim 1 is discussed below as representative, although independent claim 48 is also included in Ground of Rejection Number 1, and should be grouped with claim 1 for purposes of this appeal. For any one of the independent reasons set forth below, the Examiner's rejections of Appellants' claims should be reversed.

a. "each said group being determined at least in part according to said request."

Independent claim 1 recites in part "each said group being determined at least in part according to said request." The Examiner has admitted that Soulanille fails to disclose the foregoing recitation. (Final Office Action, page 3.) However, the Examiner asserted that Bates compensates for the acknowledged deficiencies of Soulanille. In fact, while Bates' disclosure does mention "dividing [search] results into multiple groups" (Bates, Abstract), Bates does not teach or suggest "each said group being determined at least in part according to said request."

In contrast to determining groups "at least in part according to said request," Bates teaches saving search parameters when a user performs an Internet search. Then, "if a subsequent related search is made, the search parameters are transferred to the internet search engine and [are] used to reorder or otherwise modify the search results." (*Id.*) Before search results are provided to a user,

the search engine re-orders search results by dividing the results into multiple groups, including (in order of priority:[] (a) those URLs which are new since the last search; (b) those URLs which have been previously visited [but] have changed . . . ; (c) those URLs which existed before the previous search, but have not been visited by the user; and (d) those URL's [sic] which the user has previously visited and have not changed.

(*Id.*) In other words, Bates provides a pre-defined, static set of groups. The presence of a group in Bates' search results is not in any way dependent on a user's search request, or on the particular

search results returned. Rather, Bates teaches obtaining a set of search results and then putting each result into one of the pre-defined groups. Further, Bates' search results are allocated to groups using stored parameters, not "according to said request."

Bates accordingly does not teach or suggest "each said group being determined at least in part according to said request." As noted above, Bates' groups are pre-determined and do not change regardless of the user's search request. Moreover, because Bates' groups are pre-determined, one of ordinary skill would have thought it wholly unnecessary to have groups "determined at least in part according to said request." Therefore, Bates not only fails to teach or suggest "each said group being determined at least in part according to said request," but Bates actually teaches against this recitation of claim 1.

For at least the foregoing reasons, the present rejection of claim 1, and all claims dependent therefrom, should be reversed. For similar reasons, the present rejections of claim 48 and all claims dependent therefrom should also be reversed.

b. Soulanille Would Not Have Been Combined With Bates.

Nothing in either reference would have made possible or obvious a combination of Soulanille with Bates, particularly given how Soulanille is alleged by the Examiner to operate. The Examiner asserted that Soulanille teaches that "said listings within said tier are ordered in accordance with at least one of" the heuristics recited in claim 1. (Final Office Action, page 3.) However, Bates teaches that its URLs and groups are sorted in order of priority. (Bates, column 11, lines 49-54.) The Examiner gave no explanation as to how listings could be ordered within tiers according to the heuristics recited in claim 1 and also according to groups, or why one would have wanted to do so. In fact, Appellants respectfully submit that ordering listings according to the heuristics recited in claim 1 would preclude ordering the listings according to the prioritized groups taught by Bates. Therefore, for the further reason that the combination of Soulanille and Bates could not have been obvious, the present rejection of claim 1 should be reversed, as should the rejection of claim 48.

2. Claim 10 Is Separately Patentable.

Claim 10 depends from independent claim 1. Thus, claim 10 is patentable at least for the reasons discussed above with regard to claim 1. Moreover, claim 10 recites in part "said listings

belonging to said tier belong to the same said group.” In rejecting claim 10, the Examiner stated that “the listings belonging to the same tier could easily belong to the same group, if, for example, the highest priority group in Bates filled the tier, or the higher priority groups in Bates produced no results, leaving the tier to be filled by the lowest priority group.” (Final Office Action, page 4.) Thus, the Examiner has plainly conceded that, assuming Soulanille and Bates could or would have been combined, at a minimum many instances of search results returned by such combination would not include “said listings belonging to said tier belong to the same said group.” Indeed, the Examiner contended that “said listings belonging to said tier belong to the same group” would be found in Bates for cases where Bates’ priority groups would be rendered ineffective. Placement of all of the listings into one or the other priority group, for example the highest or lowest priority group, would, in effect, be the same as not using Bates’ priority groups at all.

Further, imposing tiers on Bates’ groups would interfere with the ordering taught by Bates. In an effort to bypass this inability to combine, the Examiner proposed special cases where “the highest priority group in Bates filled the tier, or the higher priority groups in Bates produced no results, leaving the tier to be filled by the lowest priority group,” because admittedly, in many other cases tiers could easily re-order listings such that listings would no longer stay within Bates’ pre-defined groups. (Final Office Action, Page 4.) To prevent such re-ordering, additional elements not taught or suggested by Bates or any of the other references would be required to ensure that “said listings belonging to said tier belong to the same said group.” The Examiner has given no reason why an appropriate individual would have modified the proposed combination of Soulanille and Bates to ensure that “said listings belonging to said tier belong to the same said group,” or provided a combination of references that would have taught or suggested “said listings belonging to said tier belong to the same said group.” Thus, Appellants respectfully submit that the proposed combination of Soulanille and Bates is insufficient to maintain the present rejection of claim 10.

Thus, for at least the foregoing reasons, claim 10 is separately patentable.

3. Claim 17 Is Separately Patentable.

Claim 17 depends from independent claim 1. Thus, claim 17 is patentable at least for the reasons discussed above with regard to claim 1. Moreover, claim 17 recites “a plurality of responses, said plurality of responses including a first response and a second response, wherein said

first response includes said tier and wherein said second response does not include said tier.” The Examiner conceded that “Soulanille does not disclose a second response not including a tier of paid listings.” (Final Office Action, page 5.) The Examiner did not cite any reference teaching or suggesting that “said second response does not include said tier,” instead speculating that “in the case of someone requesting results on a search term for which no advertiser had bid, such a tier would be absent, and presumably only unpaid listings . . . would be displayed.” (*Id.*, pages 4-5.) Clearly, the Examiner cannot meet his burden of a prima facie case of obviousness by presuming that the prior art could include certain claim elements. Appellants respectfully submit that the Examiner’s speculation is an insufficient basis on which to maintain the rejection of claim 17. For at least this reason, claim 17 is separately patentable.

4. Claim 27 Is Separately Patentable.

Claim 27 depends from claim 26, which depends from claim 1. Thus claim 27 is patentable at least for the reasons discussed above with regard to claim 1. Moreover, claim 27 recites “[t]he system of claim 26, wherein said tier includes three said listings.” The Examiner cited Figure 7 of Soulanille as allegedly disclosing these recitations. (Final Office Action, page 6.) In contrast to “wherein said tier includes three said listings” (emphasis added), Soulanille’s Figure 7 merely discloses seven paid listings and two unpaid listings. (Soulanille, Fig. 7, col. 17 lines 8-15.) Indeed, Figure 7 does not contemplate tiers of a specified size, let alone tiers of three listings each, and in contrast merely discloses to show all the available paid listings, padded with unpaid listings to complete the screen. (*Id.*) Thus, for at least the foregoing reasons, claim 27 is separately patentable.

C. Ground Of Rejection No. 2: Claims 2 And 3 Are Separately Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, And Weidlich.

Claim 2 depends from claim 1, and claim 3 depends from claim 2. Claims 2 and 3 are therefore patentable for at least the reasons discussed above with regard to claim 1. Moreover, claim 2 recites, “a plurality of priority metrics, wherein said administrative subsystem uses at least some of said priority metrics to selectively identify said listings for inclusion in said tier.” The Examiner admitted that Soulanille “does not expressly disclose that the administrative subsystem uses at least some (and more than one) of the priority metrics (together) to selectively identify the listings for inclusion in the tier.” (Final Office Action, page 6.) The Examiner then cited Weidlich

as allegedly curing the acknowledged deficiencies of Soulanille by stating, “Weidlich teaches using several priority metrics together to selectively identify listings for inclusion in a tier of search results (especially paragraph beginning, “True search engines use software robots”).” (Final Office Action, page 6.) In fact, Weidlich fails to teach or suggest the aforementioned claim recitations.

“A priority metric can be used by the placement heuristic to identify the desired order of various listings,” where “the placement heuristic is a sub-process that is part of the response heuristic.” (Specification, page 42, lines 5-27; Figure numbers omitted.) “The response heuristic is the process performed by the system to populate the response,” and “[a] result heuristic is the process by which the results of a request are obtained.” (Specification, page 40, lines 32-33; page 41, lines 18-19; Figure numbers omitted.) Further,

the administrative subsystem impacts the functioning of the other subsystems because the administrative rules define how the request subsystem captures requests, how the result subsystem generates results from requests, and how the response subsystem generates responses from results.

(Specification, page 63, lines 22-26; Figure numbers omitted.)

In contrast, Weidlich discloses a spider crawling the Internet looking for web pages, which are then compiled to create indices, wherein “[e]ach search engine uses a different algorithm to determine how relevant a Web page is to a user’s query, assigning different weight to such factors as body text, links and meta tags.” (Weidlich, paragraph beginning “it’s important to understand”). Weidlich merely discloses that variations in the creation of indexes of potential search results “will garner different results.” (*Id.*) Although Weidlich may disclose using an algorithm to determine relevancy, this disclosure is insufficient to teach or suggest the aforementioned claim recitations at least because Weidlich lacks any teaching or suggestion of an “administrative subsystem” to impact the functioning of the other subsystems, let alone “wherein said administrative subsystem uses at least some of said priority metrics to selectively identify said listings” including subsystems that generate results from requests or responses from results.

Further, even if Weidlich teaches or suggests “a plurality of priority metrics, wherein said administrative subsystem uses at least some of said priority metrics to selectively identify said listings,” which it does not, Weidlich still fails to teach or suggest, “a plurality of priority metrics wherein said administrative subsystem uses at least some of said priority metrics to selectively

identify said listings for inclusion in said tier.” (Emphasis added.) In contrast, as noted above Weidlich merely discloses presenting the user listings from an index for the corresponding search keywords. (*Id.*) Indeed, Weidlich fails to have any teaching or suggestion related to tiers at all.

For at least any of the foregoing reasons, claim 2, as well as claim 3 depending therefrom, are separately patentable.

D. Ground Of Rejection No. 3: Claims 7, 8, 9, 11, 12, 15, 19, and 37 Are Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates and Might.

Claims 7, 8, 9, 11, 12, 15, and 19 all depend, directly or indirectly, from claim 1. Claim 37 depends from claim 36, which depends from claim 1. Therefore, these claims, while not argued separately in this appeal, are all patentable at least for the reasons set forth above concerning Ground of Rejection No. 1.

E. Ground Of Rejection No. 4: Claims 16 and 24 Are Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates and Corn.

Claims 16 and 24 both depend from claim 1. Therefore, these claims, while not argued separately in this appeal, are all patentable at least for the reasons set forth above concerning Ground of Rejection No. 1.

F. Ground Of Rejection No. 5: Claims 20 and 21 Are Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates and Littlefield.

Claims 20 and 21 depend, directly or indirectly, from claim 1. Therefore, these claims, while not argued separately in this appeal, are all patentable at least for the reasons set forth above concerning Ground of Rejection No. 1.

G. Ground Of Rejection No. 6: Claim 25 Is Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates and Singh.

Claim 25 depends directly from claim 1. Therefore, claim 25, while not argued separately in this appeal, is patentable at least for the reasons set forth above concerning Ground of Rejection No. 1.

H. Ground Of Rejection No. 7: Claims 28 and 29 Are Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, and Barron.

Claim 28 depends from independent claim 1. Claim 29 depends from claim 28. Thus, claims 28 and 29 are patentable at least for the reasons discussed above with regard to claim 1. Moreover, claim 28 recites “a plurality of tiers, a plurality of responses, a plurality of requests, and a

plurality of tier processing rules, wherein a number of said tiers and said tier processing rules differ for different said requests.” The Examiner acknowledged that “Soulanille does not expressly disclose that the tier processing rules differ for different search requests.” (Final Office Action, page 13.) The Examiner then cited Barron for the proposition that “is well known to apply different known variations of a technique in different cases.” (Final Office Action, pages 13-14.)

However, Barron’s library fundraising techniques have nothing to do with tiers, tier processing rules, or search requests. Simply because it is known to vary known techniques does not mean that the recitation of claim 28 would have been obvious. The Examiner is plainly engaged in hindsight reasoning by starting with the elements recited in Appellants’ claim and then concluding that it would have been obvious to try those elements. The Examiner has not stated what technique is allegedly being varied, or provided any explanation as to why the elements recited in claim 28 would have been obvious variants of that technique, much less support in the references of record for such teachings, all of which are required for the Examiner to maintain a prima facie case of obviousness.

Therefore, the rejection of claim 28 should be reversed because there is no teaching or suggestion in the references of record for the specific recitations of claim 28: “a plurality of tiers, a plurality of responses, a plurality of requests, and a plurality of tier processing rules, wherein a number of said tiers and said tier processing rules differ for different said requests.” The rejection of claim 29 should be reversed at least by reason of that claim’s dependence from claim 28.

I. Ground Of Rejection No. 8: Claims 28 and 29 Are Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, and Loh.

Claim 28 depends from independent claim 1. Claim 29 depends from claim 28. Thus, claims 28 and 29 are patentable at least for the reasons discussed above with regard to claim 1. Moreover, claim 28 recites “a plurality of tiers, a plurality of responses, a plurality of requests, and a plurality of tier processing rules, wherein a number of said tiers and said tier processing rules differ for different said requests.” The Examiner acknowledged that “Soulanille does not expressly disclose that the tier processing rules differ for different search requests.” (Final Office Action, page 14.) The Examiner then cited Loh for the proposition that “is well known to apply different known variations of a technique in different cases.” (Final Office Action, pages 14-15.)

However, Loh is directed to a polymerase chain reaction and has nothing to do with tiers, tier processing rules, or search requests. Simply because it is known to vary known techniques does not mean that the recitation of claim 28 would have been obvious. The Examiner is plainly engaged in hindsight reasoning by starting with the elements recited in Appellants' claim and then concluding that it would have been obvious to try those elements. The Examiner has not stated what technique is allegedly being varied, or provided any explanation as to why the elements recited in claim 28 would have been obvious variants of that technique, much less support in the references of record for such teachings, all of which are required for the Examiner to maintain a prima facie case of obviousness.

Therefore, the rejection of claim 28 should be reversed because there is no teaching or suggestion in the references of record for the specific recitations of claim 28: "a plurality of tiers, a plurality of responses, a plurality of requests, and a plurality of tier processing rules, wherein a number of said tiers and said tier processing rules differ for different said requests." The rejection of claim 29 should be reversed at least by reason of that claim's dependence from claim 28.

J. Ground Of Rejection No. 9: Claims 28 and 29 Are Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, and Thomann.

Claim 28 depends from independent claim 1. Claim 29 depends from claim 28. Thus, claims 28 and 29 are patentable at least for the reasons discussed above with regard to claim 1. Moreover, claim 28 recites "a plurality of tiers, a plurality of responses, a plurality of requests, and a plurality of tier processing rules, wherein a number of said tiers and said tier processing rules differ for different said requests." The Examiner acknowledged that "Soulanille does not expressly disclose that the tier processing rules differ for different search requests." (Final Office Action, page 16.) The Examiner then cited Thomann for the proposition that "is well known to apply different known variations of a technique in different cases." (Final Office Action, page 16.)

However, Thomann is directed to managing workflow for pension products, and has nothing to do with tiers, tier processing rules, or search requests. Simply because it is known to vary known techniques does not mean that the recitation of claim 28 would have been obvious. The fact that Thomann discloses that "numerous variations may be used as may be appropriate to a particular business use" does not in any way teach or suggest that the recitations of claim 28 are obvious. The Examiner is plainly engaged in hindsight reasoning by starting with the elements recited in

Appellants' claim and then concluding that it would have been obvious to try those elements. The Examiner has not stated what technique is allegedly being varied, or provided any explanation as to why the elements recited in claim 28 would have been obvious variants of that technique, much less support in the references of record for such teachings, all of which are required for the Examiner to maintain a *prima facie* case of obviousness.

Therefore, the rejection of claim 28 should be reversed because there is no teaching or suggestion in the references of record for the specific recitations of claim 28: "a plurality of tiers, a plurality of responses, a plurality of requests, and a plurality of tier processing rules, wherein a number of said tiers and said tier processing rules differ for different said requests." The rejection of claim 29 should be reversed at least by reason of that claim's dependence from claim 28.

K. Ground Of Rejection No. 10: Claim 30 Is Separately Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, And Schena.

Claim 30 depends from independent claim 1. Thus, claim 30 is patentable at least for the reasons discussed above with regard to claim 1. Moreover, claim 30 recites, "[t]he system of claim 1, further comprising a user location, wherein said system automatically includes said user location as part of said request." The Examiner admitted that "Soulanille does not disclose that the system automatically includes the user location as part of a request." (Final Office Action, page 17.) The Examiner contended that "it is well known to automatically include a user location as part of a search request, as taught by Schena (e.g., paragraphs 10, 11, 52, 53, and 54)." However, one of ordinary skill in the art would not have thought it possible to combine Schena with Soulanille, Bates or any other reference.

Schena teaches scanning print media from which machine-readable code is extracted and then combined with user information to be sent to a portal server via a network, where then a multimedia information sequence is sent to the receiver via the network. (Schena, Abstract.) Schena's "invention is related to bridging the gap between the virtual multimedia-based Internet works and the physical world of tangible object media." (Schena, page 1, lines 15-17.) Indeed, it is central to Schena to include print media with multimedia content, because without "tangible object media," Schena would be missing one of the two worlds Schena intends to bridge, and thus Schena could not be made to function. However, neither Soulanille nor Bates contains disclosure of "tangible object media," let alone scanners of such media, so there would be no way to combine

Schena with Soulanille or Bates without fatally compromising the function of Schena. Mere disclosure of determining the scanner's location, without more, is insufficient to have resulted in a combination of these separate references, especially when the references are directed to unrelated systems, as is the case here. Therefore, for at least the foregoing reasons, claim 30 is separately patentable.

L. Ground Of Rejection No. 11: Claim 32 Is Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, And Mangold.

Claim 32 depends from claim 31, which in turn depends directly from claim 1. Therefore, claim 32, while not argued separately in this appeal, is patentable at least for the reasons set forth above concerning Ground of Rejection No. 1.

M. Ground Of Rejection No. 12: Claim 33 Is Separately Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, Mangold and Mahanta.

Claim 33 depends from claim 32, which depends from claim 31, which depends from independent claim 1. Thus, claim 33 is patentable at least for the reasons discussed above with regard to claim 1. Moreover, claim 33 further recites "a number of hits and a period of time in which to measure said number of hits, wherein said number of hits in said period of time influence said variable per-hit fee." The Examiner conceded that none of the references applied to claim 32 (Soulanille, Bates, and Mangold) "disclosed that the number of hits in time in which to measure said number of hits influence a variable per-hit fee." (Final Office Action, page 17.) However, the Examiner contended that Mahanta compensated for the acknowledged deficiencies of the other cited prior art by allegedly disclosing "assuring the usefulness of a site by requiring a minimum number of impressions or click-through." (*Id.*) In fact, neither Mahanta nor any of the other cited references disclosed that "said number of hits in said period of time influence said variable per-hit fee."

The portion of Mahanta cited by the Examiner merely discusses the right of an e-tailer to recognize revenues for click-throughs of banner advertisements:

E-tailers are in for a reality check, too. Most dotcoms recognize revenue based on the value of goods sold online. ICIA says that won't do. Unless the ownership of the goods sold rests with the e-tailer, it can only recognize the commission it received from the transaction as its revenue. In the case of revenue from banners and other paid ads where the fee is contingent on a minimum number of impressions or

click-throughs, the revenue should not be recognized until that promised level has been reached. Says the monograph: “The ad revenue should only be recognized when no significant obligations remain at the end of the period and collection of the resulting receivable is reasonable certain.”

(Mahanta, paragraph beginning “E-tailers are in for a reality check, too.”) This disclosure by Mahanta in no way teaches or suggests that “said number of hits in said period off time influence said a variable per-hit fee.” In fact, Mahanta does not include teachings or suggestions that have anything to do with variable per-hit fees at all, but rather discusses accounting issues related to recognizing revenue from banner advertisements.

Further, the Examiner took Official Notice of the recitations of claim 33 in the Office Action of November 24, 2006, and was respectfully requested to provide support for such official notice in the Office Action Response of February 15, 2007. (See 37 CFR 1.104(d)(2) and MPEP § 2144.03, which states that “the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained.”) However, in the Final Office Action, the Examiner failed to provide documentary evidence to disclose “said number of hits and said period of time influence said variable per-hit fee,” instead citing the unrelated Mahanta reference. Therefore, the Examiner has stated insufficient basis for rejecting claim 33, and thus the rejection of claim 33 should be reversed at least for this reason.

Moreover, the Examiner’s continued speculation that “it would have been obvious . . . for the number of hits or period of time to influence the variable per-hit fee, for such obvious advantages as charging more during times of the year when advertising is more in demand” is wholly unsupported by the prior art of record. Indeed, the Examiner’s continued use of unsupported Official Notice on this point only serves to reinforce the fact that none of the prior art references teach or suggest at least, “said number of hits and said period of time influence said variable per-hit fee,” and therefore the rejection of claim 33 should be reversed at least for the foregoing reasons.

N. Ground Of Rejection No. 13: Claim 32 Is Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, and Acres.

Claim 32 depends from claim 31, which in turn depends directly from claim 1. Therefore, claim 32, while not argued separately in this appeal, is patentable at least for the reasons set forth above concerning Ground of Rejection No. 1.

O. Ground Of Rejection No. 14: Claim 33 Is Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, Acres, and Mahanta.

As stated above, claim 33 depends from claim 32, which depends from claim 31, which depends from independent claim 1. Thus, claim 33 is patentable at least for the reasons discussed above with regard to claim 1. Moreover, Claim 33 recites “[t]he system of claim 32, further comprising a number of hits and a period of time in which to measure said number of hits, wherein said number of hits and said period of time influence said variable per-hit fee.” For at least the reasons stated above, and contrary to the allegation of the Examiner (Final Office Action, page 19), Mahanta does not teach or suggest that “said number of hits and said period of time influence said variable per-hit fee.” Thus for at least the aforementioned reasons with regard to the present ground of rejection of claim 33, claim 33 is separately patentable over the references, and the rejection should be reversed.

P. Ground Of Rejection No. 15: Claims 34 and 35 Are Separately Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Bates, and Acres.

1. Claim 34 Is Separately Patentable.

Claim 34 depends from claim 1. Thus, claim 34 is patentable at least for the reasons discussed above with regard to claims 1. Moreover, claim 34 recites, “[t]he system of claim 1, further comprising a plurality of per-hit fee types.” The Examiner admitted that “Soulanille does not disclose a plurality of per-hit fee types.” (Final Office Action, page 19.) The Examiner then contended that “a plurality of per-hit fee types are well known, as taught, for example, by Acres (paragraphs 4, 5, and 6).” (Id.) However Acres fails to teach or suggest at least “a plurality of per-hit fee types” as recited by claim 34.

In contrast to “a plurality of per-hit fee types,” Acres discloses other types of fees. Acres states that “[a]n advertiser may pay a displaying web site that displays their advertisement a certain amount each time that a user accesses a web page of the displaying web site that includes the advertisement.” (Acres, paragraph [0004].) Acres thus teaches a per-display fee, and not a “per-hit fee type” as recited in Appellants’ claims. At most, Acres discloses that “the advertiser may pay the displaying web site an additional amount each time a user clicks through the advertisement.” (Id.) Therefore, Acres mentions at most one “per-hit fee type.” Acres fails to teach or suggest “a

plurality of per-hit fee types,” as recited in Appellants’ claims. For at least the foregoing reasons, claim 34 is separately patentable.

2. Claim 35 Is Separately Patentable.

Claim 35 depends from claim 34, which depends from claim 1. Thus, claim 35 is patentable at least for the reasons discussed above with regard to claims 1 and 34. Moreover, claim 35 recites, “[t]he system of claim 34, wherein said plurality of listings includes a first listing, wherein said first listing is associated with more than one said per-hit fee type.” The Examiner contended that Soulanille discloses a plurality of listings (Final Office Action, page 19), but the Examiner failed to point to any passage in Soulanille, Bates, Acres, or any other reference that allegedly discloses the claim recitation that “said first listing is associated with more than one said per-hit fee type.” Instead, the Examiner opined without support that “it would have been obvious to one of ordinary skill in the art of electronic commerce at the time of applicant’s invention for the first listing to be associated with the more than one per-hit fee type, for the obvious advantage of profiting from different fee types.” (*Id.*) However, at least because there is no teaching or suggestion in any of the prior art for a system “wherein said first listing is associated with more than one said per-hit fee type,” the Examiner’s speculation is wholly unjustified, and is improper as a basis of rejection. Indeed, the Examiner’s lack of support for this point reinforces the fact that none of the prior art references teach or suggest at least, “wherein said first listing is associated with more than one said per-hit fee type.” Therefore, for at least the foregoing reasons claim 35 is separately patentable.

Q. Ground Of Rejection No. 16: Claims 38–42 and 44–46 Are Separately Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, “Google Comes Out Ahead,” and Bates.

Independent claim 38 recites in part “each said group being determined at least in part according to said request.” Claim 38, as well as all claims depending therefrom, are patentable for at least the reasons discussed above with regard to claim 1. Moreover, there are additional reasons for the patentability of claims 38–42 and 44–46, discussed below.

1. The Combination Of Soulanille, “Google Comes Out Ahead,” And Bates Does Not Teach Or Suggest All Of The Elements Of Appellants’ Claims.

Claim 38 recites in part that “said administrative rules provide for ordering said listings included in said response.” The Examiner admitted that “Soulanille does not expressly disclose that

the administrative rules also prioritize the listings within other tiers” (Final Office Action, page 21), and cited “Google Comes Out Ahead” as disclosing these recitations of claim 38. However, although “Google Comes Out Ahead” discloses that the Google search engine would “consistently rank the most useful and relevant sites as highest on the list” in a test of “five typical business research queries” (Google Comes Out Ahead, paragraphs 3 and 5), nowhere does the reference teach or suggest that “said administrative rules provide for ordering said listings included in said response,” as recited in Appellants’ claim 38. Instead, the article makes the conclusory statement that results returned by Google are “most useful and relevant,” without any disclosure regarding “ordering said listings included in said response,” let alone “said administrative rules provide for ordering said listings included in said response.” Moreover, Bates is not cited for and fails to cure this deficiency of Soulanille.

Thus, for at least the aforementioned reasons, the alleged combination of Soulanille, the anonymous article “Google Comes Out Ahead,” and Bates fails to teach or suggest at least this claim recitation of claim 38 and therefore the rejection of claim 38, as well as all claims depending therefrom, should be reversed.

2. Claims 45 And 46 Are Separately Patentable.

Claim 45 depends from claim 40, which depends from independent claim 38. Claim 46 depends directly from independent claim 38. Thus, claims 45 and 46 are patentable at least for the reasons discussed above with regard to claim 38.

Moreover, claims 45 and 46 each recite independently patentable subject matter. Claim 45 recites in part:

a first listing and a second listing, wherein a priority metric associated with said first listing is higher than a priority metric associated with said second listing, and wherein said second listing is given a more favorable placement than said first listing.

(Emphasis added.) Similarly, claim 46 recites in part:

comprising a first listing and a second listing and a plurality of per-hit fees, wherein each said listing in said response is associated with at least one said per-hit fee, wherein said per-hit fee associated with said first listing is higher than said per-hit fee associated with said second listing, and wherein said second listing is given a more favorable placement than said first listing.

(Emphasis added.) In contrast to “said second listing is given a more favorable placement than said first listing” as recited in Appellants’ claims, Soulanille instead discloses a scheme wherein listings are ordered using a weighted random scheme, and therefore Soulanille fails to teach or suggest at least these elements of claims 45 and 46. (Soulanille, col. 21, line 51 – col. 22, line 50.)

Soulanille’s scheme unpredictably determines the order of the listings. In a random ordering listings of higher rank or priority could appear below those of lower rank or priority some of the time. However, that such an event is capable of occurring does not mean that Soulanille teaches or suggests that it occurs. Further, Soulanille’s random scheme teaches away from the recitation “wherein said second listing is given a more favorable placement,” because such “more favorable placement” would destroy Soulanille’s random scheme.

Thus, for at least the foregoing reasons, claims 45 and 46 are separately patentable.

R. Ground Of Rejection No. 17: Claim 43 Is Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, “Google Comes Out Ahead,” Bates, and Might.

Claim 43 depends from claim 41, which in turn depends from claim 40, which in turn depends directly from claim 38. Therefore, claim 43, while not argued separately in this appeal, is patentable at least for the reasons set forth above concerning Ground of Rejection No. 16.

S. Ground Of Rejection No. 18: Claim 47 Is Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, “Google Comes Out Ahead,” Bates, and Littlefield.

Claim 47 depends directly from claim 38. Therefore, claim 47, while not argued separately in this appeal, is patentable at least for the reasons set forth above concerning Ground of Rejection No. 16.

T. Ground Of Rejection No. 19: Claims 49 and 52-56 Are Separately Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Watanabe, and Bates.

Independent claim 49 recites in part “each said group being determined at least in part according to said request.” Claim 49, as well as all claims depending therefrom, are patentable for at least the reasons discussed above with regard to claim 1. Moreover, there are additional reasons for the patentability of claims 49 and 52-56, discussed below.

1. Watanabe Cannot Be Combined With Soulanille Or Bates.

One of ordinary skill in the art would not have thought it possible to combine Watanabe with Soulanille, Bates or any other reference. Watanabe teaches a system whereby a user forwards a message to other users on his “buddy list,” and upon receipt of the message, those other users then forward the message on to yet others. (Watanabe, Abstract.) Thus, the system of Watanabe “takes advantage of information-exchange relationships set up in instant messaging systems,” to send a message to “great numbers of persons.” (Watanabe, paragraph 0011, Abstract.) However, neither Soulanille nor Bates contain disclosure of lists of buddies or instant messaging, and the Examiner gave no explanation as to how communication between buddies could be incorporated with search listings in general, let alone with “inputting the tier criteria to define the number of tiers in the response and the number of listings within the tiers” as required by Appellant’s claims. Mere disclosure of the inputting of data, without more, is insufficient to support a combination of these separate references, especially when the references are directed to unrelated systems, as is the case here. Therefore, for at least the reason that Watanabe would not have been combined with Soulanille or Bates, the rejection of claim 49, as well as all claims dependent therefrom, should be reversed.

2. The Combination of Soulanille, Watanabe, And Bates Does Not Teach Or Suggest All Of The Elements Of Appellants’ Claims.

Even assuming that Watanabe would have been combined with the other references, the combination of Soulanille, Watanabe, and Bates nonetheless fails to teach or suggest elements of Appellants’ claims.

Claim 49 recites, in part, “inputting the tier criteria to define the number of tiers in the response and the number of listings within the tiers.” The Examiner acknowledged the failure of Soulanille to disclose these claim recitations. (Final Office Action, page 27.) The Examiner then cited Watanabe, without even addressing the specific claim recitation. In contrast to addressing the claim language, the Examiner merely asserted that “it is well known to input programs, files, and particular criteria into computers, as taught, for example, in Watanabe (paragraphs 57 and 58).” However, in contrast to any teaching or suggestion of “inputting the tier criteria to define the number of tiers in the response and the number of listings within the tiers,” Watanabe instead

simply discloses the “input of reception conditions that serve as judgment criteria for judging whether or not to receive the distribution information that the first computer distributes.”

Although the “reception conditions” of Watanabe are input, they differ significantly from the recited “tier criteria” because the “reception conditions” are used for determining whether or not to receive data. Watanabe’s “reception conditions” are not used for defining the format of data, let alone for “defin[ing] the number of tiers in the response and the number of listings within the tiers.” For at least these reasons, the rejection of claim 49, as well as all claims dependent therefrom, should be reversed..

U. Ground Of Rejection No. 20: Claim 50 Is Separately Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Watanabe, Bates, and Thomann.

Claim 50 depends from claim 49. Thus, claim 50 is patentable at least for the reasons discussed above with regard to claim 49. Moreover, claim 50 recites “[t]he method of claim 49, further comprising associating a particular type of placement heuristic to coincide with a particular type of request.” The Examiner admitted that Soulanille “does not disclose associating a particular type of placement heuristic to coincide with a particular type of request.” (Final Office Action, page 29.) The Examiner then stated that “is well known to match particular kinds of answers, or particular procedures, to particular kinds of requests, as taught, for example, by Thomann (paragraph 99).” (*Id.*) Based on Thomann’s alleged disclosure, the Examiner then stated that the foregoing recitation of claim 50 would have been obvious. (*Id.*)

However, Thomann discloses nothing more than that “any number of types (and subtypes) of requests can be used, each having a particular procedure,” and that “numerous variations may be used as appropriate to a particular business use.” (Thomann, paragraph 99.) Thomann is directed to managing workflow in pension products (Thomann, Title, Abstract), and includes no teaching or suggestion related to “a particular type of placement heuristic,” much less a placement heuristic that coincides “with a particular type of request.”

In sum, for at least the aforementioned reasons, claim 50 is separately patentable.

V. Ground Of Rejection No. 21: Claim 51 Is Separately Patentable Under 35 USC § 103(a) Over The Combination Of Soulanille, Watanabe, Bates, and Might.

Claim 51 depends directly from claim 49. Therefore, claim 43, while not argued separately in this appeal, is patentable at least for the reasons set forth above concerning Ground of Rejection No. 19.

CONCLUSION

In view of the foregoing arguments, Appellants respectfully submit that all of the pending claims are patentable under 35 U.S.C. § 112, first paragraph. In view of the above analysis, a reversal of the rejections of record is respectfully requested of this Honorable Board.

It is believed that any fees associated with the filing of this paper are identified in an accompanying transmittal. However, if any additional fees are required, they may be charged to Deposit Account 18-0013, under Order No. 66703-0014, from which the undersigned is authorized to draw. To the extent necessary, a petition for extension of time under 37 C.F.R. 1.136(a) is hereby made, the fee for which should be charged against the aforementioned account.

Dated: August 10, 2011

Respectfully submitted,

Electronic signature: /Charles A. Bieneman/
Charles A. Bieneman
Registration No.: 51,472
Michael B. Stewart
Registration No.: 36,018
RADER, FISHMAN & GRAUER PLLC
Correspondence Customer Number: 10291
Attorneys for Appellants

APPENDIX A

Pursuant to 37 C.F.R. § 41.37(c)(vii), the following listing provides a copy of the claims involved in this appeal.

1. An information distribution system, comprising:
a user subsystem, said user subsystem providing for a request from a user and a response, wherein said user subsystem provides for receiving said request and providing said response;
one or more computer servers configured to provide:
a listing subsystem, said listing subsystem providing for a plurality of listings, wherein at least a subset of said listings are included in said response;
a plurality of groups, wherein each said listing in said response is associated with at least one said group, each said group being determined at least in part according to said request; and
an administrative subsystem, said administrative subsystem providing for a tier, wherein said administrative subsystem selectively identifies two or more listings within said response for inclusion in said tier, wherein said listings within said tier are ordered in accordance with at least one of: (a) a random heuristic; (b) a weighted random heuristic; and (c) a placement heuristic not applied to all of the listings in said response.
2. The system of claim 1, further comprising a plurality of priority metrics, wherein said administrative subsystem uses at least some of said priority metrics to selectively identify said listings for inclusion in said tier.
3. The system of claim 2, further comprising a plurality of rankings, wherein said administrative subsystem uses said rankings to selectively identify said subset of listings for inclusion in said tier.
4. The system of claim 1, further comprising a plurality of tiers.

5. The system of claim 4, wherein said listings within each said tier are ordered in accordance with at least one of: (a) a random heuristic; (b) a weighted random heuristic; and (c) a placement heuristic.

6. The system of claim 4, wherein each listing in said response is included in one of said plurality of tiers.

7. The system of claim 1, further comprising a category selection, wherein said request includes said category selection, and wherein the selective identification of said subset of listings is influenced by said category selection.

8. The system of claim 1, further comprising a geography selection, wherein said request includes said geography selection, and wherein the selective identification of said subset of listings is influenced by said geography selection.

9. The system of claim 1, further comprising a geography selection, wherein the selective identification of said subset of listings is influenced by said geography selection.

10. The system of claim 1, wherein said listings belonging to said tier belong to the same said group.

11. The system of claim 1, further comprising a plurality of geography attributes and a plurality of category attributes, wherein each said listing in said response is associated with at least one said geography attribute and at least one said category attribute.

12. The system of claim 11, wherein each said listing in said tier shares said geography attribute and wherein each said listing in said tier shares said category attribute.

13. The system of claim 1, further comprising a plurality of payment type attributes, wherein each said listing in said response is associated with at least one payment type attribute.

14. The system of claim 13, wherein each said listing in said tier shares said payment type attribute.

15. The system of claim 1, further comprising a category selection and a category key word, wherein said request includes said category selection and said category key word, wherein said category selection and said category key word influence the selective identification of said subset of listings to be included in said response.

16. The system of claim 1, further comprising a minimum bid amount and a plurality of per-hit fees, wherein all said listings within said tier are associated with per-hit fees that exceed said minimum bid amount.

17. The system of claim 1, further comprising a plurality of responses, said plurality of responses including a first response and a second response, wherein said first response includes said tier and wherein said second response does not include said tier.

18. The system of claim 17, further comprising a plurality of requests, said plurality of requests including a first request and a second request, wherein said first request causes the display of said first response, and wherein said second request causes the display of said second response.

19. The system of claim 1, further comprising a plurality of responses, wherein only said listings associated with a national tier are included in said responses, said national tier including a first tier, a second tier, and a third, tier and a fourth tier, and said plurality of responses including a first response, a second response, and a third response.

20. The system of claim 1, further comprising an enhanced display format, wherein at least one said listing in said response includes said enhanced display format.

21. The system of claim 20, wherein said listing that includes said enhanced display format is included in said tier.

22. The system of claim 1, further comprising a position adjustment factor, wherein at least one said listing in said response includes said position adjustment factor.

23. The system of claim 22, wherein said listing that includes said position adjustment factor is included in said tier.

24. The system of claim 1, further comprising a minimum fee and a plurality of fees, wherein each said listing in said response is associated with at least one said fee, and wherein said fee for each said listing in said response exceeds said minimum fee.

25. The system of claim 1, further comprising a per-hit fee type, a minimum bid increment, and a plurality of per-hit fee values, wherein at least two listings in said response are associated with said per-hit fee type, wherein each said listing associated with said per-hit fee type is associated with at least one said per-hit fee value, and wherein all per-hit fee values are in accordance with said minimum bid increment.

26. The system of claim 1, further comprising a group of national sponsors sharing a common category and a plurality of tiers, wherein said response is comprised entirely of listings associated with said group of national sponsors sharing said common category.

27. The system of claim 26, wherein said tier includes three said listings.

28. The system of claim 1, further comprising a plurality of tiers, a plurality of responses, a plurality of requests, and a plurality of tier processing rules, wherein a number of said tiers and said tier processing rules differ for different said requests.

29. The system of claim 28, further comprising an administrator interface, wherein said administrator interface provides for modifying said tier processing rules.

30. The system of claim 1, further comprising a user location, wherein said system automatically includes said user location as part of said request.

31. The system of claim 1, further comprising a per-hit fee, wherein at least one listing in said response is associated with said per-hit fee.

32. The system of claim 31, further comprising a variable per-hit fee, wherein said per-hit fee is said variable per-hit fee.

33. The system of claim 32, further comprising a number of hits and a period of time in which to measure said number of hits, wherein said number of hits and said period of time influence said variable per-hit fee.

34. The system of claim 1, further comprising a plurality of per-hit fee types.

35. The system of claim 34, wherein said plurality of listings includes a first listing, wherein said first listing is associated with more than one said per-hit fee type.

36. The system of claim 1, further comprising a category key word, wherein said request includes said category key word.

37. The system of claim 36, further comprising a category selection, wherein said request also includes said category selection.

38. A system for distributing information, comprising:
a depository of information, said depository of information including a plurality of listings;
and
a server, said server including a request from a user, a response, and a plurality of administrative rules, said plurality of administrative rules including a plurality of placement heuristics;
wherein said server is configured to generate said response from said request by accessing said depository of information and said administrative rules;
wherein said administrative rules provide for ordering said listings included in said response;
wherein said administrative rules provide for identifying two or more listings in said response as belonging to a tier identified from a plurality of tiers; and
wherein said administrative rules prioritize said listings within said of tiers using said plurality of placement heuristics; and
wherein said administrative rules provide for generating a plurality of groups, wherein each said listing in said response is associated with at least one said group, each said group being determined at least in part according to said request.

39. The system of claim 38, said plurality of tiers including a first tier and a second tier, said plurality of placement heuristics including a first placement heuristic and a second placement heuristic, wherein said first placement heuristic orders said listings within said first tier, wherein said second placement heuristic orders said listings within said second tier, and wherein said first placement heuristic is not identical to said second placement heuristic.

40. The system of claim 38, further comprising a plurality of priority metrics, wherein each said listing in said response is associated with at least one of said priority metrics.

41. The system of claim 40, wherein said priority metrics influence the administrative rules in selectively identifying listings for inclusion in said tier.

42. The system of claim 41, wherein said listings are selectively identified for inclusion in said tier in accordance with said priority metrics.

43. The system of claim 41, wherein the affiliations with said groups influence the administrative rules in selectively identifying listings for inclusion in said tier.

44. The system of claim 40, further comprising a plurality of rankings, wherein each said listing in said response includes at least one said ranking, wherein said listings are ranked in accordance with said priority metrics, and wherein said administrative subsystem uses said rankings to selectively identify said listings for inclusion in said tier.

45. The system of claim 40, further comprising a first listing and a second listing, wherein a priority metric associated with said first listing is higher than a priority metric associated with said second listing, and wherein said second listing is given a more favorable placement than said first listing.

46. The system of claim 38, further comprising a first listing and a second listing and a plurality of per-hit fees, wherein each said listing in said response is associated with at least one said per-hit fee, wherein said per-hit fee associated with said first listing is higher than said per-hit fee associated with said second listing, and wherein said second listing is given a more favorable placement than said first listing.

47. The system of claim 38, further comprising an enhanced display format and a position adjustment factor, wherein at least one said listing is associated with said enhanced display format and wherein at least one said listing is associated with said position adjustment factor.

48. An information distribution system, comprising:

one or more computer servers configured to provide:

a user subsystem, said user subsystem providing for a request from a user and a response, wherein said user subsystem provides for receiving said request and providing said response;

a listing subsystem, said listing subsystem providing for a plurality of listings, wherein at least a subset of said listings are included in said response; and

an administrative subsystem, said administrative subsystem providing for a plurality of tiers, wherein said administrative subsystem selectively identifies two or more listings within said response for inclusion in one of said tiers, wherein said listings within said one of said tiers are ordered in accordance with at least one of: (a) a random heuristic; (b) a weighted random heuristic; and (c) a placement heuristic,

said administrative subsystem further providing for generating a plurality of groups, wherein each said listing in said response is associated with at least one said group, each said group being determined at least in part according to said request.

49. A method for displaying a response to a request, comprising:

configuring a plurality of administrative rules implemented on a computer server to organize a plurality of listings within a response into at least one tier based on a plurality of tier criteria, wherein said administrative rules include a tier placement heuristic for ordering listings within the tier, wherein not all listings within the response belong to the tier;

inputting the tier criteria to the computer server to define on the computer server the number of tiers in the response and the number of listings within the tiers; and

configuring the administrative rules on the computer server to generate a plurality of groups, wherein each said listing in said response is associated with at least one said group, each said group being determined at least in part according to a request from a user.

50. The method of claim 49, further comprising associating a particular type of placement heuristic to coincide with a particular type of request.

51. The method of claim 49, wherein said system provides for a plurality of request types that includes at least two of: (a) a national request constrained by category; (b) a national request constrained by name; (c) a local request constrained by category; (d) a local request constrained by name; and (e) a phone number submission.

52. The method of claim 49, further comprising loading a computer program on a server to automatically implement the administrative rules without human intervention.

53. The method of claim 49, wherein said administrative rules include at least one priority metric calculation, and wherein said priority metric calculations influences the positioning of said listings in said response.

54. The method of claim 53, wherein the listings are selectively placed into one of a plurality of tiers in accordance with the priority metric calculations associated with the listings.

55. The method of claim 49, wherein the administrative rules provide that listings belonging to the same tier are ordered in a random fashion.

56. The method of claim 49, wherein the administrative rules provide that listings belonging to the same tier are ordered in a random weighted fashion that is influenced by the corresponding priority metrics.

APPENDIX B

Not applicable – in this Appeal, Appellants do not rely on any evidence submitted pursuant to 37 C.F.R. §§ 1.130, 1.131, or 1.132, or on any other evidence entered by the Examiner.

APPENDIX C

Included with the filing of this Appeal Brief are copies of the decisions rendered by the Board of Patent Appeals and Interferences for the following related proceedings identified in Section II above:

1. U.S. Application No. 10/801,156, filed March 15, 2004, and entitled “INFORMATION DISTRIBUTION SYSTEM AND METHOD THAT PROVIDES FOR ENHANCED DISPLAY FORMATS”, now U.S. Patent No. 7,974,878, issued July 5, 2011.
2. U.S. Application No. 11/340,647, filed January 27, 2006, and entitled “INFORMATION DISTRIBUTION SYSTEM,” now U.S. Patent No. 7,974,879, issued on July 5, 2011.



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/801,156	03/15/2004	Lester Chu	66703-0015	2193
10291 7590 10/28/2010 RADER, FISHMAN & GRAUER PLLC 39533 WOODWARD AVENUE SUITE 140 BLOOMFIELD HILLS, MI 48304-0610				
EXAMINER ROSEN, NICHOLAS D				
ART UNIT 3625		PAPER NUMBER		
MAIL DATE 10/28/2010		DELIVERY MODE PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LESTER CHU, EDWIN HARADA, DOUGLAS HEATHERLY,
TIMOTHY MAHONEY, JAMES MESSINA, and JAMES PALMA

Appeal 2009-002739
Application 10/801,156
Technology Center 3600

Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and JOSEPH
A. FISCHETTI, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 1-36, 38-47, and 49-51. We have jurisdiction under 35 U.S.C. § 6(b) (2002). Claims 37 and 48 have been canceled.

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellants claim a system and method for distributing information, including the ability to enhance or modify the display of such information listings, making identification easier by potential customers and more effective for information providers (Specification ¶ [0036], [0037]).

Claim 1 is representative of the subject matter on appeal.

1. An information distribution system, comprising:
a sponsor subsystem, said sponsor subsystem including:
 a plurality of listing attributes;
 a plurality of listings, wherein each listing includes at least one listing attribute,
wherein said plurality of listings include an enhanced listing; and
 a plurality of format attributes, including a first format attribute and a second format attribute, wherein said first format attribute is associated with said enhanced listing and wherein said second format attribute is associated with at least one said listing that is not said enhanced listing;
a user subsystem, said user subsystem including:

a request, said user subsystem providing for the receipt of said request; and

a response, said user subsystem providing for said response;
and

an administrator subsystem, said administrator subsystem including:

a response heuristic, said response heuristic providing for selectively identifying a subset of said listings to be included in said response, wherein said subset of listings includes said enhanced listing;

a plurality of priority metrics, wherein each listing in said response is associated with at least one said priority metric;

an enhanced display fee, wherein said enhanced display fee is associated with said enhanced listing; and

a placement heuristic, wherein said placement heuristic provides for arranging said subset of listings within said response, wherein the placement of each said listing is influenced by at least one said priority metric associated with said listing, and wherein the placement of said enhanced listing is not influenced by said enhanced display fee.

THE REJECTIONS

The Examiner relies upon the following as evidence of
unpatentability:

Talib	US 2001/0044837 A1	Nov. 22, 2001
Littlefield	US 6,564,208 B1	May 13, 2003
Might	US 2003/0177076 A1	Sep. 18, 2003
Mangold	US 2004/0186769 A1	Sep. 23, 2004
Veach	US 2004/0267612 A1	Dec. 30, 2004
Jha	US 2005/0033641 A1	Feb. 10, 2005

Anon., "Intasys Corporation Subsidiaries Mamma.com Inc. And Intasys Billing Technologies Comment on Q3 2001 Results Discuss Recent Events," Business Wire, October 31, 2001

Helen, posting on alt.windows98, September 7, 2002.

Kanell, M.E., "Personal Technology Bellsouth Putting Yellow Pages Online," Atlanta Journal-Constitution, Business section, p 5, April 20, 1997.

The following rejections are before us for review.

The Examiner rejected claims 1-6, 10, 13-17, 19-24, 30-32, 44-47, 49, and 51 under 35 U.S.C. 103(a) as being unpatentable over Littlefield.

The Examiner rejected claims 7, 18, 25, and 39-43 under 35 U.S.C. 103(a) as being unpatentable over Littlefield and Official Notice.

The Examiner rejected claim 8 under 35 U.S.C. 103(a) as being unpatentable over Littlefield and Helen.

The Examiner rejected claim 9 under 35 U.S.C. 103(a) as being unpatentable over Littlefield and Veach.

The Examiner rejected claims 11 and 12 under 35 U.S.C. 103(a) as being unpatentable over Littlefield and Might.

The Examiner rejected claims 26-29 under 35 U.S.C. 103(a) as being unpatentable over Littlefield and Talib.

The Examiner rejected claim 33 under 35 U.S.C. 103(a) as being unpatentable over Littlefield and Mangold.

The Examiner rejected claim 34 under 35 U.S.C. 103(a) as being unpatentable over Littlefield, Mangold, and Anonymous.

The Examiner rejected claims 35 and 36 under 35 U.S.C. 103(a) as being unpatentable over Littlefield and Jha.

The Examiner rejected claims 38 and 50 under 35 U.S.C. 103(a) as being unpatentable over Littlefield and Kanell.

ISSUES

Did the Examiner err in rejecting claims 1-6, 10, 13-17, 19-24, 30-32, 44-47, 49, and 51 on appeal as being unpatentable under 35 U.S.C. § 103(a) over Littlefield on the grounds that a person with ordinary skill in the art would understand that since Littlefield discloses that the amount charged by the search engine controller may vary based on a variety of factors, including the size and type of the non-default items that web page owners desire to have as listings for their pages, that Littlefield discloses an *enhanced display fee, wherein said enhanced display fee is associated with said enhanced listing?*

Did the Examiner err in rejecting claims 1-6, 10, 13-17, 19-24, 30-32, 44-47, 49, and 51 on appeal as being unpatentable under 35 U.S.C. § 103(a) over Littlefield on the grounds that a person with ordinary skill in the art would understand that since Littlefield discloses only influencing the placement of a listing ranking based on satisfying a user's interests, that Littlefield discloses *wherein the placement of said enhanced listing is not influenced by said enhanced display fee?*

Did the Examiner err in rejecting claims 1-6, 10, 13-17, 19-24, 30-32, 44-47, 49, and 51 on appeal as being unpatentable under 35 U.S.C. § 103(a) over Littlefield on the grounds that a person with ordinary skill in the art would understand that since Littlefield discloses a *priority metric* which determines the order of listings based on their relevance to the request made by a user, and that the order “usually” takes the form of a ranking most likely to satisfy the interest specified by the user, that Littlefield therefore discloses a *plurality of priority metrics, wherein each listing in said response is associated with at least one said priority metric?*

FINDINGS OF FACT

We find the following facts by a preponderance of the evidence:

1. The Examiner found that Littlefield teaches or suggests an enhanced display fee:

Examiner reiterates that Littlefield does disclose an enhanced display fee, only a little lower in column 4 (lines 24-47), where Littlefield clearly and expressly discloses extra fees for including "non-default items" in listings, the "non-default items" being enhancements to the listings, such as company logos, having the listing shown in bold, in a particular font, or in a font of a certain size.

(Answer 24).

2. The Specification does not define the term “enhanced display fee.”

3. The Specification describes an enhanced display fee by way of example in stating:

The following listing attributes 106 are examples of potential bases for charging some type of enhanced display fee of the listing: (a) length of text (as measured in characters, words, sentences, or any other metric); (b) font size; (c) font type; (d) incorporation of graphics; (e) incorporation of color; (f) incorporation of animation; (g) an interactivity opportunity; (h) a detailed view; or (i) any other mechanism that calls more attention to the listing 104.

(Specification ¶ [00235]).

4. Littlefield discloses an enhanced display fee in that, “[t]he amount charged by the search engine controller may vary based on a variety of factors, including the size and type of the non-default items that web page owners desire to associate with the search result listings for their pages.” (Col. 4 ll. 6-9).

5. Littlefield discloses that an enhanced display fee for a “non-default item” may be for “...images, banners, controls, animations, and even applets in the JAVA language ...” (Col. 3 ll. 15-18).

6. Littlefield discloses a method to determine the order of search results listings based on satisfying the interest specified by the user, stating:

Typically, the search engine orders the search results prior to presenting the search results interface to the user. The order usually takes the form of a “ranking”, where the document with the highest ranking is the document considered most

likely to satisfy the interest reflected in the search criteria specified by the user. The specific techniques for determining that ranking will vary from implementation to implementation....

(Col. 2 ll. 8-15).

7. Littlefield does not disclose that search order results placement is influenced by the payment of fees for the enhancement of the appearance of any listing.

8. The Specification describes the term *priority metric* as a calculation to determine the order in which to display listings in that “[a] priority metric 179 can be used by the placement heuristic 174 to identify the desired order of various listings 104. The inputs for the calculation of the priority metric 179 can include virtually any of the listing attributes 106 and request attributes 134 relating to the listing 104.” (Specification ¶ [0215]).

9. Littlefield discloses a per-hit fee amount, where the enhanced display fee is included as part of said per-hit fee amount associated with said enhanced listing in that the “search engine provider may also charge click-through fees based on how many times the search engine users actually select a search result listing that is associated with a non-default item.” (Col 4. ll. 11-14).

10. The Specification describes fee type attributes in the context of either fees for enhanced listings are charged on a fixed/subscription or per-click/per-hit basis, stating:

Fee type attributes 112 relate to financial characteristics of the listing 104 with respect to

processing performed by the system 100. For example, some listings 104 can involve charging the advertiser 102 each time a particular listing is presented in a response 144 to a request 132. Such an arrangement can be referred to as a per-hit fee amount 113 where a per-hit payment offered by the advertiser is deducted with each "hit" of the listing. ...

Another example of a type attribute 112 is a fixed-fee amount 111. In contrast to a per-hit fee amount 113, listings 104 of the fixed-fee type 111 do not result in advertisers 102 being charged on a per-hit basis. Instead, fixed-fee type listings 104 result in a set subscription charge for a period of time.

(Specification ¶ [0139-0140]).

11. Littlefield discloses a plurality of fee type attributes where the enhanced display fee associated with the enhanced listing is influenced by the fee type attributes and click-through/per-hit fees for enhanced or non-default content:

The amount charged by the search engine controller may vary based on a variety of factors, including the size and type of the non-default items that web page owners desire to associate with the search result listings for their pages. Instead of or in addition to a subscription fee for associating non-default items with search result listings, search engine provider may also charge click-through fees based on how many times the search engine users actually select a search result listing that is associated with a non-default item.

(Col. 4 ll. 6-14).

12. Littlefield discloses that the detailed view of an enhanced or non-default listing requires an affirmative invocation through the user interface before displaying in that, “[a] typical use of such non-default items would be to entice the search engine user to select the associated page.” (Col. 6 ll. 9-11).

13. Littlefield provides a visual example of an enhanced display/non-default listing which requires an affirmative invocation through the user interface before displaying at the element 150a portrayal of a web-based uniform record locator (URL) for the PALM website that the user must select in order to view the “Palm Computing” content (Fig. 1B).

Excerpt of Littlefield Figure 1B



An excerpt of Figure 1B showing an enhanced listing requiring invocation

14. Talib discloses that an enhanced display fee associated with an enhanced listing/advertisement is influenced by a category attribute, *i.e.*, such as a health insurance category, with which the listing may be associated:

If a business wants its advertisement to be seen whenever a user is attempting to locate a pharmacy, a publisher may charge a fee of \$1.00. Each time a user selects the "Location" taxonomy 7002 the user would see an ad corresponding to this search level. If, however, a business only

wants to advertise when a user is seeking information on health insurance, then the publisher may charge a higher amount, say \$2.00 to allow ad 7000 to be displayed when a user clicks on the category "Health Insurance & Information" 7004.

(¶ [0111]).

15. Intasys discloses wherein the number of hits and period of time influence the variable per-hit fee in that, "an advertiser is not charged for multiple click throughs from the same IP address within a 24-hour period."

(Pg. 1).

16. Littlefield discloses advertiser interface providing for the selection of at least one enhanced attribute and at least one enhanced display fee with an optional fee for an optional display attribute, in that, "Instead of or in addition to web-page-specific subscriptions, a mechanism is provided which allows domain-specific subscriptions. For example, a company may have registered the domain mycompany.com. The company could obtain a subscription that associates a graphic representing the logo of the company with the domain name." (Col. 4 ll. 56-61).

17. Kanell discloses that a user may pay to have an Internet-based Yellow Pages listing appear in a particular listing category:

In a move the company hopes will profitably propel its Yellow Pages business into the Internet age, BellSouth today launches an online version of its listings that will be free to anyone with a computer and a Net Connection. ... You can seek out a particular business by name, or search by category (hardware stores, radio stations,

restaurants, etc.). You can often narrow that by clicking, for example, on Restaurants Italian or Greek or Kosher. (One caveat: A business has to pay to be listed in more than one, so don't assume it will be in each place it could logically be listed.)

(¶ 3, 5).

18. The Examiner found that Kanell discloses “businesses paying for enhancements in the online Yellow Pages similar to those in the printed Yellow Pages, where companies can pay for bold-faced listings and large box ads that include more information ads.” (Ans. 23).

19. The Specification describes that request attributes can include selections of geography, subject category, and more, because “...request attributes 134 inputted to the group determination process can include one or more geography selections 136, one or more category selections 138, and any other attribute types relating to the request 132.” (¶ [00286]).

20. The Specification describes that “[r]equest attributes 134 can include text describing the product, such as brand information.” (¶ [00399]).

21. Littlefield discloses that providing users with the option to pay for enhanced listings would discourage users from trying to alter the order of search results listings, in that, “By providing web page owners the ability to compete for the attention of the users of a search engine through the use of non-default content, the incentive for those web page owners to employ artificial means to obtain higher search rankings is reduced. Consequently, the integrity and accuracy of search engine results may improve.” (Col. 4 ll. 15-20).

ANALYSIS

We affirm the rejections of claims 1-36, 38-47, and 49-51.

Claims 1 and 44

Initially, we note that the Appellants argue independent claims 1 and 44 together as a group. Correspondingly, we select representative claim 1 to decide the appeal of these claims, with the remaining claim 44 standing or falling with claim 1. Appellants do not provide a substantive argument as to the separate patentability of claims 2-5, 7, 10, 13-17, 19, 21-24, 30-32, 45, 47, and 49 that depend from claims 1 and 44. Thus, claims 2-5, 7, 10, 13-17, 19, 21-24, 30-32, 45, 47, and 49 stand or fall with claims 1 and 44. See, 37 C.F.R. § 41.37(c)(1)(vii)(2004).

Initially, we note that Appellants assert that the “Examiner’s Answer did not address” the argument that “Littlefield fails to teach or suggest an ‘enhanced display fee.’” (Reply Br. 2). We do not agree with this assertion, because we note that the Examiner addressed the argument by making a finding which addressed this issue. (FF 1).

We also are not persuaded by Appellants’ underlying argument that “nowhere does Littlefield teach or suggest an ‘enhanced display fee.’” (Appeal Br. 24). We find that the Specification does not define the term *enhanced display fee* (FF 2). The Specification describes the term only by way of example, as a basis for charging an *enhanced display fee* for any number of listing characteristics, including the use of graphics, animation,

and interactive opportunity (FF 3). Thus, an *enhanced display* fee need only be a basis for charging for listing characteristics.

We next find that Littlefield discloses that “[t]he amount charged by the search engine controller may vary based on a variety of factors, including the size and type of the non-default items that web page owners desire to associate with the search result listings for their pages” (FF 4). Since those non-default items may include graphics, animation, and interactive opportunity, which are included in the Specification as enhanced display fee characteristics (FF 5), Littlefield meets the claim limitation *enhanced display fee, wherein said enhanced display fee is associated with said enhanced listing*. We note that although Littlefield does not utilize the term *enhanced listing* fee, it nevertheless discloses payment for enhanced display fee charges; anticipation “is not an ‘*ipsissimis verbis*’ test”, i.e., identity of terminology is not required. *In re Bond*, 910 F.2d 831, 832-33 (Fed. Cir. 1990) (citing *Akzo N.V. v. U. S. Int’l Trade Comm’n*, 808 F.2d 1471, 1479 n.11 (Fed. Cir. 1986)). “An anticipatory reference ... need not duplicate word for word what is in the claims.” *Standard Havens Prods., Inc., v. Gencor Indus., Inc.*, 953 F.2d 1360, 1369 (Fed. Cir. 1991).

Appellants next argue “Littlefield does not ... in any way teach or suggest ‘the placement of the enhanced listing is not influenced by the enhanced display fee.’” (Appeal Br. 24).

We are not persuaded by Appellants’ argument here for the following reasons. First, Littlefield only explicitly discloses that the placement of

listings is influenced based on satisfying a user's interests (FF 6). Further, we find that Littlefield does not make any disclosure or suggestion that fees paid to enhance the display appearance of a listing (i.e. the *enhanced display fee*) have influence over the placement of the listing (FF 7). While there is no assurance that all enhanced listing placements would not be influenced by enhanced display fees, we nevertheless base our findings on what is explicitly disclosed in Littlefield - namely that listing ranking is based on users' interests. Since the rejection is made under 35 U.S.C. § 103(a), and even if we were to assume some listings were so influenced, other listings would still not be, and thus the claim requirement would be met by the listings which were not so influenced.

Appellants argue "Littlefield fails to teach or suggest any criteria for ranking other than the general idea of user interest, much less does Littlefield teach or suggest 'a priority metric'" because "at most Littlefield discloses a 'ranking,' not 'a plurality of priority metrics'"(Appeal Br. 25-26).

We disagree with Appellants on both assertions. First, we interpret *priority metric* to be a broad term associated with determining the order in which listings are displayed. We find in the Specification that a *priority metric* can be based on inputs which comprise attributes of a search request made by a user, including a requested geography, requested subject category, requested brand information or "virtually any" attribute of the search request made by the user (FF 19, 20). Correspondingly, we find that Littlefield discloses determining the order of listings based on the listing

results most likely to satisfy the user's listing request (FF 6). We thus find that the Appellants' request attributes would be tied to user satisfaction because the user is satisfied when desired information is found on the Internet.

Claim 39

Independent claim 39 is argued by reference to the arguments of claim 1. Since the disputed claim element is common to claim 1 and addressed above, and claim 39 was rejected using Littlefield, we affirm the rejection of claim 39 under 35 U.S.C. § 103(a) over Littlefield and Official Notice for the same reasons as claim 1.

Claims 6 and 46

Appellants argue that Littlefield "fails to teach or suggest 'wherein the enhanced display fee is part of the per-hit fee'" (Appeal Br. 34), and that Littlefield "teaches away" at least in part because Littlefield additionally discloses a "subscription fee" (Appeal Br. 26, 35).

We are not persuaded by this argument because Littlefield discloses that a "search engine provider may also charge click-through fees based on how many times the search engine users actually select a search result listing that is associated with a non-default item" (FF 9). Thus, the search engine may charge a per-hit fee that includes the fee for any *enhanced*/non-default listing, as required by the claims. Further, Littlefield does not teach away from the claim limitation on the basis of disclosing a subscription fee. Rather, Littlefield states, "[i]nstead of or in addition to a subscription fee for

associating non-default items with search result listings, search engine provider may also charge click-through fees ...” (FF 11). Since Littlefield associates enhanced display fees with either subscription fees or per-hit fees or both, and Littlefield does not advise against associating enhanced display fees with per-hit fees, there is no teaching away. *See In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994).

Claim 20

Appellants argue “Littlefield fails to teach or suggest ‘said listings displayed by said user subsystem are not displayed in an order that is in accordance with said per-hit fee” because Littlefield “teaches away” (Appeal Br. 27, 35-36).

We are not persuaded by these arguments, because as we found with claim 1, *supra*, Littlefield only discloses ordering based on satisfying the interest specified by the user results, which was not based on the per-hit fee (FF 6, 7), and thus Littlefield’s disclosure meets the claim requirements.

Claim 51

Appellants argue that Littlefield “teaches away” from “‘the listings in the response are not displayed in accordance with a per-hit fee that is associated with each of the listings’ as recited by claim 51.” (Appeal Br. 36). Appellants assert that this is because of “‘Littlefield’s purported advantage of ‘giving advertisers the ability to compete for attention through enhanced listings’ [that] in fact would have suggested that listings would be displayed in an order in accordance with a per-hit fee, and that an enhanced listing

would give an advertisers the opportunity to compete for attention despite low placement based on a per-hit fee.” (Appeal Br. 36).

We are not persuaded by Appellants’ arguments because, first, as we found with claim 1, *supra*, Littlefield only discloses ordering based on satisfying the interest specified by the user results, which was not based on the per-hit fee (FF 6, 7). Thus, Littlefield’s disclosure meets the claim requirements of the listings in the response are not displayed in accordance with a per-hit fee that is associated with each of the listings.

Second, Appellants assertions are speculative at best because simply disclosing an option of a per-hit fee does not necessarily means that it will be used to order the search results as argued. In fact, Littlefield only explicitly discloses ordering search results based on their likelihood to satisfy the user’s request for the listings (FF 6, 7). Moreover, Littlefield encourages ranking independent of per-hit fees because it discloses “[b]y providing web page owners the ability to compete for the attention of the users of a search engine through the use of non-default content, the incentive for those web page owners to employ artificial means to obtain higher search rankings is reduced.” (FF 21). As such, Littlefield does not teach away because Littlefield discourages artificial means to obtain higher search rankings, such as a per-hit fee arrangement.

Claim 30

Appellants next argue that Littlefield does not teach or suggest that the *enhanced display fee associated with said enhanced listing is influenced*

by said fee type attribute, because “Littlefield discloses differences in fees solely based on the attributes of the non-default listing, without influence of the fee type attribute” (Appeal Br. 28-29).

We are not persuaded by this argument because we interpret the term *fee type attribute* to refer to an indicator of the type of fee to charge, which includes fixed/subscription or per-click/per-hit/click-through fees (FF 10). Furthermore, we find that Littlefield discloses that fee types for *enhanced/non-default listings* may include subscription fees or click-through fees, or both, (FF 11), thus meeting the claim limitation.

Claim 8

Appellants argue that the combination of Littlefield and Helen fail to disclose the claim limitations because “Helen teaches at most a single response and not ‘a first response and a second response.’” (Appeal Br. 29).

We are unconvinced by this argument, because claim 8 differs from claim 1, its parent, primarily only by reciting additional instances of *responses*, *priority metrics*, and *listings*. We do not find the plural instances of these elements distinguishes over Littlefield’s single disclosed example of a *response*, *priority metric*, and *listing*, because the plural form is merely a duplication of the same elements. *In re Harza*, 274 F.2d 669, 671 (CCPA 1960) (“It is well settled that the mere duplication of parts has no patentable significance unless a new and unexpected result is produced ...”).

Claim 18

Appellants disagree with the Examiner's use of Official Notice to meet the claim limitation, *wherein detailed view of said enhanced listing requires an affirmative invocation through said user interface before being displayed through said user interface* (Appeal Br. 30), because Littlefield "teaches away" by "automatically displaying its non-default content" (Appeal Br. 30).

The argument fails because the Appellants have not specifically pointed out the supposed errors in the Examiner's taking of Official Notice, "includ[ing] stating why the noticed fact is not considered to be common knowledge or well-known in the art. See 37 CFR § 1.111(b)." MPEP § 2144.03(C). An adequate traverse must contain adequate information or argument to create on its face a reasonable doubt regarding the circumstances justifying Examiner's notice of what is well known to one of ordinary skill in the art. *In re Boon*, 439 F.2d 724, 728 (CCPA 1971). That has not been done here. When an Appellant does not seasonably traverse a well-known statement during examination, the object of the well-known statement is taken to be admitted prior art. *In re Chevenard*, 139 F.2d 711 (CCPA 1943).

Furthermore, we find the Examiner's use of Official Notice is cumulative, because Littlefield discloses an example of an *enhanced display/non-default listing* which *requires an affirmative invocation through said user interface before displaying* in Figure 1B at the element 150a.

(FF 12,13). This feature in Littlefield is a web-based uniform record locator (URL) for the PALM website that the user must select in order to view the “Palm Computing” content (FF 13), where the URL is provided with the purpose of enticing the user to affirmatively invoke the URL by selecting it (FF 12), thus meeting the claim limitation.

Claim 27

Appellants next argue that neither Littlefield nor Talib disclose the limitation *wherein said enhanced display fee associated with said enhanced listing is influenced by said category attribute* (Appeal Br. 32).

We disagree with Appellants because Talib discloses charging the user a fee to associate their listing with a category attribute by charging \$1.00 to associate the listing with the search category “pharmacy” and \$2.00 to associate the listing with the search category “health insurance” (FF 14), thus meeting the claim limitation by having the category attribute influence the fee, which one of ordinary skill in the art would understand could be applied to the enhanced display fee of Littlefield.

Claim 34

Appellants argue that the Intasys article does not disclose the limitation *wherein the number of hits and period of time influence the variable per-hit fee* because “the per-hit fee in Intasys remains constant, and is charged only when the system deems the click to be a proper click ...” (Appeal Br. 33).

We are not persuaded by this argument. The Intasys article describes that the advertiser is not charged for multiple clicks from the same user within a 24-hour period (FF 15). Thus, the fee charged for the first click is the usual fee, but the fees for subsequent clicks/hits within 24 hours are varied to zero, thus meeting the claim language.

Claim 42

Appellants argue that Littlefield does not disclose *said advertiser interface providing for the selection of at least one said enhanced attribute and at least one said enhanced display fee*, because “Littlefield discloses no selection of fees ...” (Appeal Br. 33-34).

We disagree with Appellants because Littlefield provides an optional mechanism for an advertiser to select an enhanced display attribute, *i.e.*, a company logo, and a fee, *i.e.* a subscription charge (FF 16), thus meeting the claim language.

Claim 50

Appellants argue that “Kanell discloses that ‘[a] business has to pay to be listed in more than one [category]’” and “companies can pay for bold-faced listings”, but “nowhere does Kanell teach or suggest that ‘enhancements’ do not appear every time, let alone ‘wherein the same listing appears in an enhanced display format in one response without appearing in an enhanced display format in another response.’” (Appeal Br. 37). That is, Appellants argue, Kanell “teaches away” by “indicating, if anything, that

such ‘enhancements’ would be displayed each time a listing in Kanell is displayed.” (Appeal Br. 37).

We find this argument unpersuasive for the following reasons. Littlefield discloses that a user may pay an extra fee to enhance the listing (*e.g.* size, type, graphics, animation, and interactivity opportunity) (FF 4), and Kanell discloses that a user may also pay to have a listing appear in particular listing categories (FF 17). The Examiner found that Kanell discloses BellSouth Yellow Pages (FF 18), and in advertising in Yellow Pages telephone books, that businesses sometimes do not pay for enhanced listings in every subscribed category. (Answer 23-24). Thus, one of ordinary skill in the art would, by inference, understand only paying for enhanced listings in some categories, but not others, meeting the claim language. See *KSR Int’l. Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). (In making the obviousness determination one “can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.”)

We also affirm the rejections of dependent claims 9, 11, 12, 25, 26, 28, 29, 33, 35, 36, 38, 40, 41, 43, and 50, since Appellants have not challenged such rejections with any reasonable specificity. See *In re Nielson*, 816 F.2d 1567, 1572 (Fed. Cir. 1987).

CONCLUSIONS OF LAW

We conclude the Appellants have not shown that the Examiner erred in rejecting claims 1-36, 38-47, and 49-51.

Appeal 2009-002739
Application 10/801,156

DECISION

The decision of the Examiner to reject claims 1-36, 38-47, and 49-51 under 35 U.S.C. § 103(a) is affirmed.

AFFIRMED

MP

RADER, FISHMAN & GRAUER PLLC
39533 WOODWARD AVENUE
SUITE 140
BLOOMFIELD HILLS MI 48304-0610



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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

1 UNITED STATES PATENT AND TRADEMARK OFFICE
2
3

4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES
6
7

8 *Ex parte* LESTER CHU,
9 EDWIN HARADA,
10 DOUGLAS HEATHERLY,
11 TIMOTHY MAHONEY,
12 JAMES MESSINA, and
13 JAMES PALMA
14

15
16 Appeal 2009-010793
17 Application 11/340,647
18 Technology Center 3600
19
20

21 Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and BIBHU R.
22 MOHANTY, *Administrative Patent Judges*.
23 FETTING, *Administrative Patent Judge*.

24 DECISION ON APPEAL¹
25

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE²

Lester Chu, et al. (Appellants) seek review under 35 U.S.C. § 134 (2002) of a final rejection of claims 1 and 101-130, the only claims pending in the application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b) (2002).

The Appellants invented an information system that makes it easier and more efficient for potential customers to identify potentially desirable providers of goods and services, while making it easier for providers to more effectively focus on advertising to potentially interest customers. Specification ¶ 0002.

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below [bracketed matter and some paragraphing added].

1. An information distribution system, comprising:

[1] a request subsystem configured to receive a request that includes a geography selection and a category selection; and

[2] a response subsystem configured to construct a response, the response subsystem including a plurality of listings, a plurality of fee types, and a placement heuristic that determines

² Our decision will make reference to the Appellants' Appeal Brief ("App. Br.," filed February 9, 2009) and Reply Brief ("Reply Br.," filed May 12, 2009), and the Examiner's Answer ("Ans.," mailed March 13, 2009), and Final Rejection ("Final Rej.," mailed September 4, 2008).

a placement and order of listings included in the response based at least in part on a fee type from the plurality of fee types associated with each of the listings, wherein said response includes two or more listings from said plurality of listings based on the request, wherein each listing is associated with at least one said fee type in said plurality of fee types.

The Examiner relies upon the following prior art:

Davis et al.	US 6,269,361 B1	Jul. 31, 2001
Quinn	US 6,360,222 B1	Mar. 19, 2002
Ching	US 6,560,620 B1	May 6, 2003
Littlefield et al.	US 6,564,208 B1	May 13, 2003
Might et al.	US 2003/0177076 A1	Sep. 18, 2003
Eileen Courter. <i>Measure for Measure</i> , 25 Credit Union Management 50, Jan. 2002.		
Tobi Elkin, <i>Paid Placement: Divided Search Party</i> , Advertising Age, col 73, p. 37, July 8,, 2002		
Chris Dillabough, <i>Postoptics Search Marketing</i> , New Media Age, p. 26, July 3, 2003		

Claims 1, 101-103, 106-109, 112-113, 115, 117-118, and 120-125 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, and Davis.

Claims 104 and 110 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and Quinn.

Claims 105 and 111 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, Quinn, and Official Notice.

Claims 114 and 119 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and Official Notice³.

Claim 116 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and Ching.

Claim 126 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Might and Littlefield.

Claim 127 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Might, Littlefield, and Davis.

Claim 128 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Might.

Claim 130 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Might and Official Notice.

Claim 129 stands rejected under 35 U.S.C. § 102(e) as being anticipated by Might.

ISSUES

The issue of whether the Examiner erred in rejecting claims 1, 101-103, 106-109, 112-113, 115, 117-118, and 120-125 under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, and Davis turns on whether the combination of Littlefield, Might, and Davis describe a placement heuristic that determines a placement and order of listings included in the response

³ Elkin, Dillabough, and Courter have been cited in support of the Examiner's taking of Official Notice of old and well known facts.

1 based at least in part on a fee type from the plurality of fee types associated
2 with each of the listings.

3 The issue of whether the Examiner erred in rejecting claims 104 and 110
4 under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and
5 Quinn turns on whether the Appellants' arguments in support of claim 1 are
6 found to be persuasive.

7 The issue of whether the Examiner erred in rejecting claims 105 and 111
8 under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis,
9 Quinn, and Official Notice turns on whether the Examiner's taking of
10 Official Notice was proper and adequately covers the scope of the claim
11 limitations.

12 The issue of whether the Examiner erred in rejecting claims 114 and 119
13 under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and
14 Official Notice turns on whether the Examiner's taking of Official Notice
15 was proper and adequately covers the scope of the claim limitations.

16 The issue of whether the Examiner erred in rejecting claim 116 under 35
17 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and Ching
18 turns on whether the Appellants' arguments in support of claim 1 are found
19 to be persuasive.

20 The issue of whether the Examiner erred in rejecting claim 126 under 35
21 U.S.C. § 103(a) as unpatentable over Might and Littlefield turns on whether
22 Might and Littlefield describe a first listing associated with a position
23 adjustment factor.

24 The issue of whether the Examiner erred in rejecting claim 127 stands
25 rejected under 35 U.S.C. § 103(a) as unpatentable over Might, Littlefield,

and Davis turns on whether the Appellants' arguments in support of claim 126 are found to be persuasive.

The issue of whether the Examiner erred in rejecting claim 128 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Might turns on whether Might describes prioritizing listings using a listing attribute.

The issue of whether the Examiner erred in rejecting claim 130 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Might and Official Notice turns on whether the Appellants' arguments in support of claim 129 are found to be persuasive.

The issue of whether the Examiner erred in rejecting claim 129 under 35 U.S.C. § 102(e) as being anticipated by Might turns on whether the Appellants' arguments in support of claim 128 are found to be persuasive.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to the Prior Art

Littlefield

01. Littlefield is directed to techniques for delivering non-default items in association with search results. Littlefield 1:6-8.

02. Littlefield describes that prior art search engines provide an interface that allows users to specify their search criteria and provide an interface for displaying the search results. Littlefield

2:6-8. Traditional search engines order search results based on a ranking, where the document with the highest ranking is considered most likely to satisfy the interest of the specified criteria. Littlefield 2:10-14.

03. Littlefield describes a method and system that associates non-default items, such as images, banners, controls, and animations, with search result listings. Littlefield 3:58-64. A search engine provider can charge web page owners in multiple manners. Littlefield 4:1-6. One way search engine providers can charge page owners is by the size and type of the non-default items. Littlefield 4:6-10. Instead of or in addition to subscription fees, fees can be also be assessed by a click-through fee based on how many times the search engine users actually select a search result listing that is associated with a non-default item. Littlefield 4:10-14. A third way to charge is by a yearly subscription fee. Littlefield 4:26-28. Littlefield describes a search result list that integrates listings with non-default items with listings without non-default items. Fig. 1A and Fig. 1B.

Might

04. Might is directed to a method and apparatus for permitting brick and mortar retailers to advertise goods and services over a network so as to permit retailers to compete in a cost effective manner with web-based retailers. Might ¶ 0002.

05. Product information is directed to a consumer in response to a search request initiated by the consumer. Might ¶ 0027. The

search request is handled by the use of a product hierarchy. Might ¶ 0027. The top of the product hierarchy is the product family, the second level is product categories, and the bottom of the hierarchy is product characteristics. Might ¶ 0027. The search request can also be limited to a geographic region determined by zip code and a specified distance from the input zip code in another embodiment. Might ¶ 0027. The results of the search request are displayed to the consumer in the form of a match list. Might ¶ 0027.

06. Might further describes a priority scheme in returning a match list to be presented to a user. Might ¶ 0029. Retailers that have provided pricing information are displayed ahead of those without pricing information. Might ¶ 0029. Within retailers who have provided pricing information, the retailers that include special pricing are displayed ahead of those without special pricing. Might ¶ 0029.

Davis

07. Davis is directed to a system and method to enable a web site promoter to define a search listing for a search result list, select a search term relevant to the promoter's website, and influence a search result list position for the search listing on an Internet search engine. Davis 4:55-60.

08. A website promoter selects a search term and influences a position within the search result list generated by that search term by participating in an online competitive bidding process. Davis

1 4:65-67 and 5:1. Search result list entries can show the rank value
2 of the advertiser's search listing. Davis 18:4-5. The rank value is
3 assigned by a process that establishes an association between the
4 bid amount, the rank, and the search term of the search listing.
5 Davis 18:5-11. The process gathers all of the search listings and
6 sorts the search listings in order from highest to lowest bid
7 amount, and assigns a rank value to each search listing in order.
8 Davis 18:11-14. The highest bid receives the highest rank value,
9 the next highest bid amount receives the next highest rank value,
10 proceeding to the lowest bid amount that receives the lowest bid
11 amount. Davis 18:14-18. Unpaid listings do not display a bid
12 amount and are displayed following the lowest-ranked paid
13 listing. Davis 18:26-30.

14
15 ANALYSIS

16 *Claims 1, 101-103, 106-109, 112-113, 115, 117-118, and 120-125*
17 *rejected under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might,*
18 *and Davis*

19 The Appellants first contend that (1) the Examiner failed to provide
20 support for the Examiner's taking of Official Notice based on the
21 Examiner's statement

22 ... it is well known for search engines to have placement
23 heuristics that determine placement and order of listings based
24 at least in part on fee types and amounts for the listings, *as*
25 *taught, for example by Davis* (emphasis added). Ans. 6-7.

1 This limitation is required by claim 1. App. Br. 18-21. We disagree
2 with the Appellants. The Examiner's rejection of claim 1 does not rely on
3 Official Notice. The Examiner adequately served notice that Davis is relied
4 on to describe or suggest this feature of claim 1. As such, the Appellants'
5 argument is not found persuasive since it is not based on the references
6 relied on in rejecting claim 1. The Appellants also argue that the Examiner's
7 challenging of the timeliness of the traversal of the taking of Official Notice
8 because similar Official Notice was taken in a parent application is
9 improper. App. Br. 20-21 and Reply Br. 3-4. While we agree that there is
10 no relevance of traversing the Examiner's taking of Official Notice in a
11 parent application, the Examiner has not relied on Official Notice in
12 rejecting claim 1 and therefore this argument is not persuasive.

13 The Appellants further contend that (2) Littlefield, Might, and Davis fail
14 to describe "a placement heuristic that determines a placement and order of
15 listings included in the response based at least in part on a fee type from the
16 plurality of fee types associated with each of the listings," as required by
17 limitation [2] of claim 1. App. Br. 21-23 and Reply Br. 3-4.

18 We disagree with the Appellants. Littlefield describes a system and
19 method that associates non-default items, such as images, banners, controls,
20 and animations, with search listing items. FF 03. Littlefield further
21 describes the use of different fee types, such as a yearly subscription or a
22 click-through fee that is based on how many times the search engine users
23 actually select a search result listing that is associated with a non-default
24 item. FF 03. Cited reference, Might, describes a method and apparatus that
25 provides search results for product searches initiated by a user. FF 05.
26 Might describes that search match lists are prioritized based on retailers who

1 have provided pricing information. FF 06. Davis describes enabling a
2 promoter to influence a search list by allowing promoters to bid for search
3 terms. FF 08. Davis further sorts search results list based on bid amounts,
4 where the highest bid amount listings are ranked first and unpaid listings are
5 placed at the end of the search results list. FF 08.

6 The combination of Littlefield, Might, and Davis describes the ability to
7 order search result listings based on an attribute of a fee, including a fee
8 amount or pricing information, and further describes associating multiple fee
9 types to search listings in a single embodiment. That is, the combination of
10 Littlefield, Might, and Davis suggests ordering search result listings based
11 on any attribute of a fee, such as a fee type. A person with ordinary skill in
12 the art would have found ordering listings based on a fee type to be an
13 obvious variant of ordering listings based on a fee amount.

14 The Appellants further contend that Davis fails to describe a plurality of
15 fee types (App. Br. 18-19), however, this contention does not persuade us of
16 error on the part of the Examiner because the Appellants are responding to
17 the rejection by attacking the references separately, even though the
18 rejection is based on the combined teachings of the references.
19 Nonobviousness cannot be established by attacking the references
20 individually when the rejection is predicated upon a combination of prior art
21 disclosures. *See In re Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir.
22 1986).

23 The Appellants also contend that (3) Littlefield and Might teach away
24 from “a placement heuristic that determines a placement and order of listings
25 included in the response based at least in part on a fee type from the plurality

1 of fee types associated with each of the listings,” as required by limitation
2 [2] of claim 1. App. Br. 23 and Reply Br. 4. We disagree with the
3 Appellants. Littlefield, Might, and Davis are all concerned with search
4 result listings and highlighting specific listings based on some attribute. FF
5 03, 06, and 08. As such, Littlefield, Might, and Davis are all concerned with
6 and directed to the same problem and teach towards providing a user with a
7 meaningful search result list. The Appellants argue that Littlefield describes
8 providing web page owners the ability to compete for the attention of users
9 and Might describes prioritization based on the cost of items and therefore
10 teaches away from ordering based on a fee for a listing. App. Br. 23-24.
11 However, the Appellants fail to provide any specific rationale as to how
12 these limited descriptions direct Littlefield and Might away from ordering a
13 search result list based on fee type. As such, the Appellants’ argument is not
14 found to be persuasive.

15 The Appellants additionally contend that (4) Might only describes a
16 region considered local to a zip code and fails to describe or suggest at least
17 two listing attributes of a plurality of geography attributes, a plurality of
18 category attributes and a plurality of fee types and at least two of group
19 affiliation of a geography attribute, a category attribute, and a fee type, as
20 required by claim 103. App. Br. 24-25 and Reply Br. 5. We disagree with
21 the Appellants. Might describes rendering search results based on a product
22 family, product types or categories, and product characteristics. FF 05.
23 Might further describes searching based on geographic criteria, including zip
24 code and a distance from a zip code. FF 05. As such, Might describes at
25 least two listing attributes and at least two group affiliations. Littlefield
26 further describes the use of multiple fee types and therefore describes

1 another listing attribute and group affiliation. Since the combination of
2 Might and Littlefield describe at least two listing attributes and group
3 affiliations, the Appellants arguments are not found to be persuasive.

4 The Appellants further contend that (5) Littlefield, Might, and Davis fail
5 to describe or suggest the feature that either a category selection and
6 geography selection is a blank value, as required by claim 107. App. Br. 25-
7 26 and Reply Br. 5-6. We disagree with the Appellants. Might describes
8 that search criteria for product characteristics and geographic area can be in
9 separate embodiments. FF 05. That is, a search request where the user does
10 not enter a product category or a geographic area can be run and the results
11 displayed for the user. As such, Might describes a category selection or a
12 geography selection is blank.

13 The Appellants also contend that (6) Littlefield fails to describe or
14 suggest a first listing that is a fixed-fee listing and a second listing that is a
15 per-hit listing, as per claim 108. App. Br. 26-27 and Reply Br. 6. We
16 disagree with the Appellants. Littlefield explicitly describes that in addition
17 to a subscription fee, a click-through fee can be used. FF 03. A click-
18 through fee is a fee based on how many times the search engine users
19 actually select a search result listing that is associated with a non-default
20 item. As such, a click-through fee is a per-hit listing fee. Since Littlefield
21 describes that both fees can be used in a single embodiment, Littlefield
22 suggests that a first listing can be a fixed-fee listing and a second listing can
23 be a per-hit listing. A person with ordinary skill in the art would have found
24 it obvious to use these two types of fees in creating a search result list that
25 has both fee types used. As such, Littlefield suggests claim 108.

1 The Appellants additionally contend that (7) Might fails to describe the
2 first listing is for a first geographic region and the second listing is for a
3 second geographic region, as per claim 109. App. Br. 27-28 and Reply Br.
4 6-7. We disagree with the Appellants. Might describes that a user can enter
5 search criteria for a zip code and a distance from the zip code. This suggests
6 that the prioritized match list will include retailer location information. The
7 location of each retailer in the match list is a separate geographic region. As
8 such, the match list in Might includes listings for multiple geographic
9 locations, including a first geographic region and a second geographic
10 region.

11 The Appellants next contend that (8) Littlefield fails to describe the
12 placement heuristics calculate a priority metric by subtracting an enhanced
13 format fee from the bid amount, as per claim 113. App. Br. 28-29 and Reply
14 Br. 7. We agree with the Appellants. Littlefield describes multiple fee
15 types, including subscription fees and click-through fees, and further
16 describes varying fees based on the size and type of fee. FF 03. However,
17 Littlefield fails to describe a bid amount and calculating a priority metric by
18 subtracting the varying fees from a bid amount. Although Davis describes
19 ordering bids based on bid amounts (FF 08), Davis and Littlefield fail to
20 describe calculating a priority metric by subtracting an enhanced format fee
21 from a bid amount. The Examiner argues that it would have been obvious
22 for the amount left to be applied to paying for priority to be reduced by
23 Littlefield's varying format fee; however, there is nothing in Davis that
24 suggests modifying a bid amount when ordering the search results list.
25 There is nothing in Davis or Littlefield that suggests reducing a bid amount
26 by a format fee. A bid amount is the fee a promoter is paying for having

1 their listing prioritized and therefore it would not be obvious to reduce a bid
2 amount by another fee. As such, we find that Littlefield, Might, and Davis
3 fail to describe claim 113.

4 The Appellants further contend that (9) Davis teaches away from the
5 limitation the second bid amount is greater than the first bid amount because
6 Davis describes ordering the bids with the greater bid amounts first, as per
7 claim 117. App. Br. 29 and Reply Br. 9. We disagree with the Appellants.
8 Davis, as noted by the Appellants, describes ordering a search results list by
9 placing the highest bid listings first and unpaid listings last. FF 08.
10 Although Davis describes a list ordered from highest to lowest, Davis does
11 not teach away from reversing the order of the list. A person with ordinary
12 skill in the art would have found it obvious to reverse such a list such that
13 the lowest or unpaid listings are placed first and the highest bid listing is
14 placed last. The ability to reverse the sorting of a list is within ordinary skill
15 in the art and a person with ordinary skill in the art would have found this to
16 be an obvious variant. The Appellants further argue that the Examiner has
17 failed to provide support for the taking of Official Notice; however, the
18 Examiner has not relied on Official Notice in rejection claim 117 and
19 therefore this argument is also not found to be persuasive.

20
21 *Claims 104 and 110 rejected under 35 U.S.C. § 103(a) as unpatentable*
22 *over Littlefield, Might, Davis, and Quinn*

23 The Appellants contend that claims 114 and 119 depend from claim 1
24 and are patentable for the same reasons argued in support of claim 1. App.
25 Br. 36 and Reply Br. 10. We disagree with the Appellants. The Appellants

arguments were not found to be persuasive *supra* and are not found
persuasive here for the same reasons.

*Claims 105 and 111 rejected under 35 U.S.C. § 103(a) as unpatentable
over Littlefield, Might, Davis, Quinn, and Official Notice*

The Appellants first contend that the Examiner failed to provide the
required support for the taking of Official Notice, as per claim 105. App.
Br. 30-31 and Reply Br. 8. We disagree with the Appellants. An adequate
traverse must contain adequate information or argument to create on its face,
a reasonable doubt regarding the circumstances justifying Examiner's notice
of what is well known to one of ordinary skill in the art. *See In re Boon*, 439
F.2d 724, 728 (CCPA 1971). If an applicant does not seasonably traverse
the taking of official notice during examination, then the object of the
official notice is taken to be admitted prior art. *In re Chevenard*, 139 *F.2d*
711, 713 (CCPA 1943). The Appellants only argue that the Examiner failed
to provide support for the taking of Official Notice, but fail to set forth any
information or arguments to create a reasonable doubt regarding what the
Examiner has noted to be well known to a person with ordinary skill in the
art. The Appellants also argue that the Examiner's Official Notice is
insufficient to cover the scope of claim 105, but this argument does not set
forth any doubt as to what facts were well known to a person with ordinary
skill in the art. As such, the Appellants' failure to adequately traverse the
taking of Official Notice, the fact that it was well known for listings to
include service area attributes, and for service areas to include geographical
regions is taken to be admitted prior art.

1 The Appellants also contend that the Examiner's allegation is an
2 insufficient basis for supporting an obviousness rejection, assuming
3 *arguendo* that the Examiner's Official Notice is proper, as per claim 105.
4 App. Br. 31 and Reply Br. 8. We disagree with the Appellants. The
5 Appellants argue that the Examiner's statement that "we deliver within the
6 towns of A and B" fails to describe the listings to include at least one of the
7 service area attributes. App. Br. 31. However, the Examiner found that it
8 was well known for service areas to include geographical regions. A
9 geographical region of a service area is an attribute of a service area. As
10 such, the Examiner's Official Notice adequately covers the scope of claim
11 105.

12 The Appellants contend that claim 111 depends from claim 1 and is
13 patentable for the same reasons argued in support of claim 1. App. Br. 36
14 and Reply Br. 10. We disagree with the Appellants. The Appellants
15 arguments were not found to be persuasive *supra* and are not found
16 persuasive here for the same reasons.

17
18 *Claims 114 and 119 rejected under 35 U.S.C. § 103(a) as unpatentable*
19 *over Littlefield, Might, Davis, and Official Notice*

20 The Appellants first contend that the Examiner's Official Notice fails to
21 address the entire limitation of claim 114. App. Br. 32-33 and Reply Br. 8.
22 We disagree with the Appellants. Claim 114 requires the construction of a
23 result, where the response is generated from the result and the result includes
24 more listings than the response. That is, claim 114 requires the generation of
25 a result set and listings presented to the user (response) is a subset of the

1 result set. The Examiner took Official Notice that it was old and well known
2 to generate and present a response from a larger result. This is the same as
3 what is required by claim 114. As such, the Examiner's taking of Official
4 Notice covers the scope of claim 114.

5 The Appellants also contend that the Examiner failed to provide the
6 required support for the taking of Official Notice, as per claim 114. App.
7 Br. 32-33 and Reply Br. 8. We disagree with the Appellants. Again, the
8 Appellants only argue that the Examiner failed to provide support for the
9 taking of Official Notice, but fail to set forth any information or arguments
10 to create a reasonable doubt regarding what the Examiner has noted to be
11 well known to a person with ordinary skill in the art. The Appellants again
12 argue that the Examiner's Official Notice is insufficient to cover the scope
13 of claim 114, but this argument does not set forth any doubt as to what facts
14 were well known to a person with ordinary skill in the art. Furthermore, the
15 Examiner has provided Elkin, Dillabough, and Courter in support of this
16 inadequately traversed Official Notice. As such, the Appellants' failure to
17 adequately traverse the taking of Official Notice, the fact that it is well
18 known to generate and present a response from a larger result is taken to be
19 admitted prior art.

20 The Appellants further contend that claim 119 depends from claim 1 and
21 is patentable for the same reasons argued in support of claim 1. App. Br. 33
22 and Reply Br. 9. We disagree with the Appellants. The Appellants
23 arguments were not found to be persuasive *supra* and are not found
24 persuasive here for the same reasons.

25

*Claim 116 rejected under 35 U.S.C. § 103(a) as unpatentable over
Littlefield, Might, Davis, and Ching*

The Appellants contend that claim 116 depends from claim 1 and is patentable for the same reasons argued in support of claim 1. App. Br. 36 and Reply Br. 10. We disagree with the Appellants. The Appellants arguments were not found to be persuasive *supra* and are not found persuasive here for the same reasons.

*Claim 126 rejected under 35 U.S.C. § 103(a) as unpatentable over
Might and Littlefield*

The Appellants contend that Might and Littlefield fail to describe “said response includes a first listing associated with a position adjustment factor,” as required by claim 126. App. Br. 33-34 and Reply Br. 9. The Appellants specifically argue that Might describes prioritizing according to their content, but fails to describe ordering according to a position adjustment factor. App. Br. 34. We disagree with the Appellants. First, we note that claim 126 is distinguished from claim 1 in that claim 1 requires listings to be ordered based on a fee type, whereas claim 126 only requires the first listing to be associated with a position adjustment factor. A position adjustment factor encompasses any attribute or value that influences the ordering of listings. Might describes displaying search listings where retailers have provided pricing information ahead of those who have not provided pricing information. FF 06. That is, pricing information is used as a position adjustment factor in ordering the match list. Littlefield also describes prior art search engines that order search results based on a ranking, where the

document with the highest ranking is considered most likely to satisfy the interest of the specified criteria. FF 02. A ranking based on a match to search criteria is a position adjustment factor. As such, both Might and Littlefield describe this limitation.

The Appellants further argue that Might and Littlefield fail to describe a position adjustment factor based on listing attributes including fee type; however, claim 126 fails to require the position adjustment factor is based on a fee type. As discussed *supra*, claim 126 is distinguished from claim 1 in this manner. Since the Appellants are arguing limitations that are not required by claim 126, the Appellants' argument is not found to be persuasive.

*Claim 127 rejected under 35 U.S.C. § 103(a) as unpatentable over
Might, Littlefield, and Davis*

The Appellants contend that claim 127 depends from claim 126 and is patentable for the same reasons argued in support of claim 126. App. Br. 36 and Reply Br. 10. We disagree with the Appellants. The Appellants' arguments were not found to be persuasive *supra* and are not found persuasive here for the same reasons.

*Claim 128 rejected under 35 U.S.C. § 103(a) as unpatentable over
Might*

The Appellants contend that Might fails to describe the limitation of "prioritizing the selectively identified listings using at least one listing

attribute” as required by claim 128. App. Br. 34-35 and Reply Br. 9. We disagree with the Appellants. As noted with claim 126, claim 128 is distinguished from claim 1 in that claim 128 does not require the prioritizing or ordering listings based on a fee type. Claim 128 only requires prioritizing listings based on a listing attribute, where a listing attribute encompasses any characteristic of the listing. As discussed *supra*, Might describes prioritizing listings based on retailers that have provided pricing information. Pricing information is a characteristic or attribute of a listing. As such, Might describes this limitation of claim 128.

The Appellants further argue that Might fails to describe using at least one listing attribute based on a fee type; however, as discussed *supra* claim 128 does not require the listing attribute to be a fee type. As such, the Appellants’ argument is not found persuasive because the Appellants are arguing limitations not required by claim 128.

*Claim 130 rejected under 35 U.S.C. § 103(a) as unpatentable over
Might and Official Notice*

The Appellants contend that claim 130 depends from claim 129 and is patentable for the same reasons argued in support of claim 129. App. Br. 36 and Reply Br. 10. We disagree with the Appellants. The Appellants’ arguments were not found to be persuasive *infra* and are not found persuasive here for the same reasons.

*Claim 129 rejected under 35 U.S.C. § 102(e) as being anticipated by
Might*

1 The Appellants contend that Might fails to anticipate claim 129 for the
2 same reasons argued in support of claims 1, 126, and 128. App. Br. 35 and
3 Reply Br. 9. We disagree with the Appellants. Claim 129 does not require
4 the limitation requiring ordering listings based on a fee type that we found
5 Might to fail to describe in the analysis of claim 1. Claim 129 requires
6 ordering listings based on one listing attribute, which is the same as claim
7 128. As such, the Appellants' arguments in support of claim 128 were not
8 found to be persuasive *supra* and are not found to be persuasive here for the
9 same reasons.

10
11 CONCLUSIONS OF LAW

12 The Examiner did not err in rejecting claims 1, 101-103, 106-109, 112,
13 115, 117-118, and 120-125 under 35 U.S.C. § 103(a) as unpatentable over
14 Littlefield, Might, and Davis.

15 The Examiner erred in rejecting claim 113 under 35 U.S.C. § 103(a) as
16 unpatentable over Littlefield, Might, and Davis.

17 The Examiner did not err in rejecting claims 104 and 110 under 35
18 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and Quinn.

19 The Examiner did not err in rejecting claims 105 and 111 under 35
20 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, Quinn, and
21 Official Notice.

22 The Examiner did not err in rejecting claims 114 and 119 under 35
23 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and Official
24 Notice.

1 The Examiner did not err in rejecting claim 116 under 35 U.S.C.
2 § 103(a) as unpatentable over Littlefield, Might, Davis, and Ching.

3 The Examiner did not err in rejecting claim 126 under 35 U.S.C.
4 § 103(a) as unpatentable over Might and Littlefield.

5 The Examiner did not err in rejecting claim 128 under 35 U.S.C.
6 § 103(a) as unpatentable over Might.

7 The Examiner did not err in rejecting claim 130 rejected under 35 U.S.C.
8 § 103(a) as unpatentable over Might and Official Notice.

9 The Examiner did not err in rejecting claim 129 under 35 U.S.C.
10 § 102(e) as being anticipated by Might.

11

12 DECISION

13 To summarize, our decision is as follows.

- 14 • The rejection of claims 1, 101-103, 106-109, 112, 115, 117-118, and
15 120-125 under 35 U.S.C. § 103(a) as unpatentable over Littlefield,
16 Might, and Davis is sustained.
- 17 • The rejection of claim 113 under 35 U.S.C. § 103(a) as unpatentable
18 over Littlefield, Might, and Davis is not sustained.
- 19 • The rejection of claims 104 and 110 under 35 U.S.C. § 103(a) as
20 unpatentable over Littlefield, Might, Davis, and Quinn is sustained.
- 21 • The rejection of claims 105 and 111 under 35 U.S.C. § 103(a) as
22 unpatentable over Littlefield, Might, Davis, Quinn, and Official
23 Notice is sustained.

- The rejection of claims 114 and 119 under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and Official Notice is sustained.
- The rejection of claim 116 under 35 U.S.C. § 103(a) as unpatentable over Littlefield, Might, Davis, and Ching is sustained.
- The rejection of claim 126 under 35 U.S.C. § 103(a) as unpatentable over Might and Littlefield is sustained.
- The rejection of claim 128 under 35 U.S.C. § 103(a) as unpatentable over Might is sustained.
- The rejection of claim 130 rejected under 35 U.S.C. § 103(a) as unpatentable over Might and Official Notice is sustained.
- The rejection of claim 129 under 35 U.S.C. § 102(e) as being anticipated by Might is sustained.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

mev

Appeal 2009-010793
Application 11/340,647

1 Address

2 RADER, FISHMAN & GRAUER PLLC
3 39533 WOODWARD AVENUE, SUITE 140
4 BLOOMFIELD HILLS MI 48304-0610